85-175

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT R. GARWOOD
Private First Class, U.S. Marine Corps,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

1. Whether a military accused is denied his right to due process of law under the fifth amendment when he is convicted of non-petty offenses by a two-thirds vote of a general court-martial composed of only five members.

2. Whether an accused is denied his right to due process of law under the fifth amendment at a court with members when the presiding judge's out-of-court statements and interviews with the media reasonably raise questions about his judgment and dedication in ensuring the fairness and integrity of the trial proceedings.

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IN THE

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No. ——

ROBERT R. GARWOOD
Private First Class, U.S. Marine Corps,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Private First Class Robert R. Garwood, U.S. Marine Corps, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Military Appeals in this case.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals (App. 1a) is reported at 20 M.J. 148 (C.M.A. 1985). The opinion of the United States Navy-Marine Corps Court of Military Review (App. 15a) is reported at 16 M.J. 863 (N.M.C.M.R. 1983).

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on June 3, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law."

STATUTORY PROVISIONS INVOLVED

Article 16, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 816, provides:

> The three kinds of courts-martial in each of the armed forces are—
>
> (1) general courts-martial, consisting of—
>
> (A) a military judge and not less than five members; or
>
> (B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;
>
> (2) special courts-martial, consisting of—
>
> (A) not less than three members; or
>
> (B) a military judge and not less than three members; or
>
> (C) only a military judge, if one has been detailed to the court, and the accused under the same

conditions as those prescribed in clause (1) (B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

Article 52(a), UCMJ, 10 U.S.C. § 852(a) provides:

(1) No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.

(2) No person may be convicted of any other offense, except as provided in section 845(b) of this title (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.

OTHER PROVISIONS INVOLVED

Canon 2A of the American Bar Association's Code of Judicial Conduct states: "A judge should respect and comply with the law and conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The commentary to Canon 2 states in part: "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety."

Canon 3A(6) of the American Bar Association's Code of Judicial Conduct states: "A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court."

STATEMENT OF THE CASE

Pursuant to his authority under the Uniform Code of Military Justice,[1] the Commanding General, Marine Corps Base, Camp Lejeune, North Carolina, convened a general court-martial to hear the case against the petitioner. Contrary to his pleas of not guilty, petitioner was convicted by a general court-martial composed of five members of communication with and holding intercourse with the enemy without authority and of assault in violation of Articles 104 and 128 of the UCMJ, respectively.[2] The court-martial members sentenced him to be reduced in rate to the lowest enlisted pay grade (E-1), forfeiture of all pay and allowances, and a dishonorable discharge from the United States Marine Corps. The Commanding General, Marine Corps Base, Camp Lejeune, North Carolina, approved the findings and sentence following his review of the case pursuant to Article 60, UCMJ.[3] The United States Navy-Marine Corps Court of Military Review approved the findings and sentence as awarded by the court-martial pursuant to Article 66, UCMJ.[4] Petitioner sought further appellate review of this case under Article 67(b)(3) of the UCMJ[5] to the United States Court of Military Appeals. However, that Court did not grant review on Question 1 and ultimately affirmed the findings and sentence below (App. 1a).

Although petitioner had moved for trial before a panel of twelve members and that the required verdict be unanimous (A.E. 91; R. 524), the military judge denied the motion (R. 533), and petitioner's general court-martial was

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[1] Article 22, UCMJ, 10 U.S.C. § 822.

[2] 10 U.S.C. §§ 904, 928.

[3] 10 U.S.C. § 860.

[4] 10 U.S.C. § 866.

[5] 10 U.S.C. § 867(b)(3).

composed of only five members.[6] Two-thirds of the members present at the time the vote was taken concurred in each finding of guilty (R. 3614).[7] Because there were five members, Article 52(a), UCMJ,[8] required only four members to vote in favor of conviction.

During the course of this trial, the military judge engaged in extensive out-of-court statements and interviews with the media (*see* App. 23a-24a). The character and extent of those remarks were summarized by the United States Navy-Marine Corps Court of Military Review (App. 24a) and quoted by the United States Court of Military Appeals (App. 3a):

> The content of his remarks involved the expression of his opinion regarding tactical decisions by the appellant's defense team; the relevancy of certain defense discovery items; comments, delivered to the

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[6] Court members at a military court-martial function in the same fact-finding capacity as a civilian jury.

[7] Although the findings of the court-martial were announced in this way, the exact vote cannot be determined. Article 51, UCMJ, 10 U.S.C. § 851, states that voting by the court members shall be by secret ballot. The oath of a court-member includes that he will "not disclose or discover the vote or opinion of any particular member of the court upon the finding or sentence unless required to do so in the course of law." *Manual for Courts-Martial, 1984*, R.C.M. 807(b)(2) (Discussion), formerly *Manual for Courts-Martial, 1969* (Rev.), ¶ 114b. Cases have held that polling a court-martial is unknown in military law. *United States* v. *Connors*, 23 C.M.R. 636 (A.B.R. 1957); *United States* v. *Tolbert*, 14 C.M.R. 613 (A.F.B.R. 1953). Since the vote of petitioner's court-martial is not indicated in the record and cannot be determined, it should be presumed that only the minimum necessary for conviction, namely four, was the vote. This presumption should be made since it is the possibility of conviction by this minimum number that petitioner attacks. Even though one member may have voted not guilty, it was still his duty to vote for a proper sentence for the offenses for which petitioner was convicted. *Manual for Courts-Martial, 1984*, R.C.M. 1006(d)(1), formerly *Manual for Courts-Martial, 1969 (Rev.)*, ¶ 76b(2).

[8] 10 U.S.C. § 852(a).

media, which could be interpreted as disparaging the testimony of one of appellant's psychiatrists; and opinions expressing the view that appellant should take the stand and testify regarding the charges.

Trial defense counsel unsuccessfully moved for dismissal of the charges, recusal of the military judge, or mistrial (*see* App. 4a n.1; 24a).

REASONS FOR GRANTING THE PETITION

Question 1: Due Process—Two-Thirds Vote—Five-Member Deliberative Body.

By its refusal to grant review of Question 1, the United States Court of Military Appeals decided an important question of federal and military law which has not been, but should be, settled by this Court, namely, whether due process is violated where there has been a military conviction for non-petty offenses by a two-thirds vote of a general court-martial composed of only five persons. This question goes right to the heart of the integrity of the military justice system. Whether such a system comports with the due process requirement that conviction can only obtain upon proof beyond a reasonable doubt, especially in light of this Court's previous decisions in *Burch* v. *Louisiana,* 441 U.S. 130 (1979), and *Ballew* v. *Georgia,* 435 U.S. 223 (1978), is a question this Court is urged to resolve.

1. Court-Martial Procedures.

Pursuant to its constitutional power "[t]o make rules for the government and regulation of the land and naval forces,"[9] Congress enacted the UCMJ in 1950. It was thereafter revised, codified, and enacted into law as part of title 10, United States Code, by the Act of August 10,

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[9] U.S. CONST. art. I, § 8, cl. 14.

1956, and has subsequently been further amended.[10] The UCMJ provides, *inter alia,* for the creation of military courts-martial, the specification of military offenses, and court-martial procedures, including the size of court-martial membership and the voting requirements for findings and sentence.

While civilian juries tend to be of a uniform size, numerical composition of special and general courts-martial panels vary considerably. The minimum number of members is five for a general court-martial and three for a special court-martial.[11] Regardless of the number of members of a court-martial, the concurrence of members necessary to convict is two-thirds.[12] Where the death penalty is mandatory,[13] only a unanimous verdict may convict.[14] To sentence a person to death, where death is not mandated, a unanimous vote is necessary.[15] To sentence a person to imprisonment for more than ten years, a concurrence of three-fourths is required, whereas all other sentences require a two-thirds vote.[16]

2. Constitutional Standards in Civilian Courts.

In *Johnson* v. *Louisiana,* 406 U.S. 356 (1972), this Court found that a nine to three vote for conviction of a nonpetty offense did not violate the due process clause because

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[10] 10 U.S.C. §§ 801-940.

[11] 10 U.S.C. § 816. These members are selected and appointed by the officer convening the court-martial. There is no maximum number of members he is allowed to appoint.

[12] 10 U.S.C. § 852(a)(2).

[13] Spying in wartime requires the death penalty. 10 U.S.C. § 906.

[14] 10 U.S.C. § 852(a)(1).

[15] 10 U.S.C. § 852(b)(1).

[16] 10 U.S.C. § 852(b)(2), (3).

a "heavy" majority of the jury was convinced of the defendant's guilt beyond a reasonable doubt. However, two later cases actually found constitutional infirmities because of either small jury size or lack of unanimity. *Burch* v. *Louisiana,* 441 U.S. 130 (1979); *Ballew* v. *Georgia,* 435 U.S. 223 (1978). In *Ballew,* this Court held that in a non-petty case, a jury composed of only five persons deprived the defendant of his right to a trial by jury under the sixth and fourteenth amendments even though unanimity was also required.

In writing the lead opinion in *Ballew,* Justice Blackmun observed that the "[s]ixth amendment mandated a jury only of sufficient size to promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community." *Id.* at 230, citing *Williams* v. *Florida,* 399 U.S. 78, 100 (1970). In *Williams,* this Court noted that in 1970 little empirical research existed which had evaluated jury performance and, therefore, it found no evidence to suggest that the intended function of the jury would be impaired by reducing its size to six members. However, since the *Williams* decision, a significant volume of research has concluded otherwise. *Ballew,* 435 U.S. at 231 n.10. Justice Blackmun noted the following findings:

(1) "[S]maller juries are less likely to foster effective group deliberation." *Id.* at 232. *See* M. Saks, *Jury Verdict* (1977) [hereinafter cited as Saks].

(2) The empirical studies also "[r]aise doubts about the accuracy of the results achieved by smaller and smaller panels, . . . [that is to say] . . . the risk of convicting an innocent person . . . rises as the size of the jury diminishes." *Id.* at 234.

(3) "[V]erdicts of jury deliberation in criminal cases will vary as juries become smaller, and . . . the variance

amounts to an imbalance to the detriment of one side, the defense." *Id.* at 236.

(4) "[P]resence of minority viewpoint [diminishes] as juries decrease in size . . ." *Id.*

(5) "[W]hen the case is close, and the guilt or innocence of the defendant is not readily apparent, a properly functioning jury system will insure evaluation by the sense of the community and will also tend to insure accurate factfinding." *Id.* at 238.

Thus, " '[l]arger juries (size twelve) are preferable to smaller juries (size six). They produce longer deliberations,[17] more communication, far better community representation, and, possibly, greater verdict reliability (consistency).' " *Id.* at 242 (quoting Saks at 107).

In *Ballew,* this Court unanimously reversed and remanded for a new trial. Although there were varying opinions as to why reversal was necessary, at least five of the Justices of this Court believed that reducing a jury to five persons in non-petty cases raised substantial doubts as to the fairness of the proceedings and proper functioning of the jury.

Approximately a year after *Ballew,* the Court held that a state law requiring only five (out of six) votes to convict was unconstitutional. *Burch* v. *Louisiana,* 441 U.S. 130 (1979).

The majority opinion stated:

> [M]uch the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the *fairness of the proceeding and the proper role of the jury,* lead us to conclude now that conviction for a non-petty offense by only five members of a six-person

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[17] The court members in this lengthy, complex case deliberated on findings only 66 minutes (R. 3613).

> jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous. (citations omitted) (emphasis added).

Id. at 138.

Justice Rehnquist rejected the State's contention that non-unanimous, six-person juries saved time, expense, and reduced the number of hung juries. He reasoned that such contentions were speculative, at best. Moreover, whenever the size of a jury is reduced to the constitutional minimum number of jurors, "the additional authorization of non-unanimous verdicts by such juries sufficiently threatens the constitutional principles that led to the establishment of the size threshold that *any countervailing interest of the State should yield.*" *Id.* at 139 (emphasis supplied).

3. Constitutional Standards and the Military.

Consideration of the above case law raises the question of whether a military accused is effectively denied his fifth amendment due process right to the standard of proof beyond a reasonable doubt when the deliberative body is small (five) and the concurrence needed for conviction is a mere two-thirds.[18] Although in *Johnson* a nine to three vote was not found to violate due process because a heavy majority of the jury was convinced of the defendant's guilt beyond a reasonable doubt, here the size of the deliberative group is less than half of the one involved in *Johnson.*

The *Ballew* and *Burch* decisions are necessarily applicable to trials by court-martial as a matter of due process. In both *Burch* and *Ballew,* the convictions were set aside because either the size or the voting procedures of the jury

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[18] In *O'Callahan* v. *Parker,* 395 U.S. 258 (1969), this Court stated that the specific right to a jury trial under the sixth amendment does not apply in the military.

threatened the fairness of the proceeding and the proper role of the jury. Under the circumstances of the instant case, petitioner questions the integrity of his court-martial's fact-finding process, especially in light of the empirical studies noted in *Ballew*. These studies analyze group decision-making as a function of group size. There is no evidence to support a conclusion that the dynamics of this decision-making process would differ materially between civilian and military juries.[19]

Although the United States Court of Military Appeals did not state its reasons for rejecting petitioner's argument on this issue, both the Army and Navy Courts of Military Review have stated why they feel the issue is without merit.[20] Their main reason was that a court-martial panel is unique and not comparable to a civilian jury because its members are selected based on various factors such as age, experience, training, and judicial temperament.[21] These decisions of the Army and Navy Courts of Military Review have been convincingly criticized.[22] There is, in reality, no basis to conclude that a civilian juror is any less capable of deciding questions of witness credibility or of drawing proper inferences from circumstantial evi-

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[19] In fact, the same Professor Saks relied upon so heavily in *Ballew* has stated that although he knows of no similar studies on military populations, "the same principles [of group decisionmaking] would apply to the military as to civilian decision makers," and "[i]n other areas of research, only negligible or no differences have been found between civilian and military populations." (App. 41a; 43a).

[20] *United States* v. *Guilford*, 8 M.J. 598 (A.C.M.R. 1979); *United States* v. *Corl*, 6 M.J. 914 (N.C.M.R. 1979); *United States* v. *Meckler*, 6 M.J. 779 (A.C.M.R. 1978); *United States* v. *Wolff*, 5 M.J. 923 (N.C.M.R. 1978); *United States* v. *Montgomery*, 5 M.J. 832 (A.C.M.R. 1978).

[21] 10 U.S.C. § 825(d)(2).

[22] Cohen, H., *The Two-Thirds Verdict: A Surviving Anachronism in an Age of Court-Martial Evolution*, 20 Cal.W.L.Rev. 9 (1983).

dence than a military court-member. Simply wearing a uniform and experiencing military life and training does not improve one's abilities as a juror.

There is no evidence or empirical data available establishing special conditions in the military which would render *Burch, Ballew,* or the due process problem raised in *Johnson* inapplicable to courts-martial. No facts exist that support a rational conclusion that a court-martial with members, particularly in peacetime, differs materially from civilian juries or "other groups" so as to make the empirical studies in *Ballew* irrelevant in a military setting. Even though a serviceman does not enjoy traditional sixth amendment jury protections in a court-martial, military courts are subject to fifth amendment due process protections, including the standard of reasonable doubt.[23] Therefore, founded upon due process principles, military defendants ought not to be constitutionally convicted of non-petty offenses by non-unanimous, five-member courts-martial. Guilt beyond a reasonable doubt requires a greater deliberative process than is presently required by Articles 16 and 52(a) of the UCMJ.

Question 2: Due Process—Misconduct by Presiding Judge.

The military judge's out-of-court statements and interviews with the media violated Canon 3 A(6) of the American Bar Association's Code of Judicial Conduct. This was the judgment of both military appellate courts. (App. 6a; 25a). The Canon states, in part, that "A judge should abstain from public comment about a pending or impending proceeding in any court . . . ." Although this canon also states that it "does not prohibit judges from making public statements in the course of their official duties or from

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[23] *In re Winship,* 397 U.S. 358 (1970); *United States* v. *Ezell,* 6 M.J. 307 (C.M.A. 1979).

explaining for public information the procedures of the court," the United States Court of Military Appeals concluded that the military judge's comments "exceeded the permissible scope of public discussion of an on-going trial by a sitting judge." (App. 6a). However, that court determined that petitioner was not prejudiced by this misconduct because there was no evidence that the members had consciously heard his comments and because they had scrupulously adhered to their duty as members. (App. 8a).

While efforts to identify actual prejudice to the members' deliberative process was manifestly appropriate, petitioner submits that the military judge, by his extraordinary involvement with the media, reasonably appeared to be insensitive to the risk that the unsequestered members might be exposed to the content of his statements. The character of those statements was summarized by the United States Navy-Marine Corps Court of Military Review (App. 24a) and quoted by the United States Court of Military Appeals (App. 3a):

> The content of his remarks involved the expression of his opinion regarding tactical decisions by the appellant's defense team; the relevancy of certain defense discovery items; comments, delivered to the media, which could be interpreted as disparaging the testimony of one of appellant's psychiatrists; and opinions expressing the view that appellant should take the stand and testify regarding the charges.

That the members may not have been tainted says nothing about petitioner's reasonable perception at the time that the military judge presiding at his trial was willing to balance the integrity and fairness of petitioner's trial against an apparent desire to keep the media well-informed. Additionally, petitioner submits that his concerns reasonably were exacerbated by the substance of some of the military judge's statements as reported by the media. In this regard, the United States Court of Military Appeals stated (App. 6a n.4):

> Admittedly, it appears that certain of the reporters may have failed at times to grasp the legal significance of some of the military judge's comments. Thus, several of the articles published in local newspapers attributed rather misleading statements to him. Of course, this is a risk a judge runs any time he lets the press question him about a pending case; and it opens up an unnecessary avenue for impermissible matter to come to the attention of court members.

Under such circumstances, what kind of confidence can an accused or the general public have in a presiding trial judge who, by his own misconduct, reasonably raises questions about his judgment and dedication in ensuring the fairness and integrity of the trial proceedings? Canon 2A of the Code of Judicial Conduct states that, "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The commentary to Canon 2 states, in part, that "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety."

Petitioner submits that the military judge's misconduct reasonably raised such serious questions about the fairness and integrity of the trial proceedings that petitioner's right to due process was violated. *Cf. State* v. *Valencia,* 124 Ariz. 139, 602 P.2d 807 (1979) (sentence set aside in criminal case where trial judge didn't disqualify himself after talking with victim's brother in chambers prior to resentencing hearing); *Chicago, M., St. P. and Pac. R.R.* v. *Washington State Human Rights Commission,* 87 Wash. 2d 802, 557 P.2d 307 (1977) (case remanded where one member of administrative hearing tribunal had job application pending with the state agency presenting discrimination complaint); *De Camp* v. *Good Samaritan Hospital,* 410 N.Y.S. 2d 671 (1978) (results of medical malpractice panel overturned and case remanded where attorney or

firm representing a defendant doctor also was representing one of the panel doctors in an unrelated malpractice action).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1985

APPENDIX

APPENDIX A

U. S. COURT OF MILITARY APPEALS.

June 3, 1985.

No. 47626

NMCM 81-1892

UNITED STATES, *Appellee,*

v.

PRIVATE FIRST CLASS ROBERT R. GARWOOD
U.S. Marine Corps, *Appellant.*

Accused, a private first class in the United States Marine Corps, was convicted by general court-martial of aiding enemy forces and assaulting American prisoner of war, and he appealed. The United States Navy-Marine Corps Court of Military Review, 16 M.J. 863, affirmed. Review was granted. The United States Court of Military Appeals, Cox, J., held that: (1) military judge's conduct in engaging in press and media interviews in which he made comments on the case did not disqualify him from participating in the trial, and (2) prosecution of accused did not constitute impermissible selective prosecution.

Affirmed.

For Appellant: *John C. Lowe, Esq.* (argued); *J. Lloyd Snook, III, Esq., Lieutenant Commander William A. DeCicco, JAGC, USN, Lieutenant Commander Richard K. Delmar, JAGC, USNR-R, Lieutenant Commander Frederick N. Ottie, JAGC, USN.*

For Appellee: *Lieutenant Commander John B. Holt, JAGC, USN* (argued); *Captain W. J. Hughes, JAGC, USN, Commander Richard A. Monteith, JAGC, USN, Lieutenant Colonel Thomas H. Eagen, USMC* (on brief).

Opinion of the Court

COX, Judge:

On or about September 28, 1965, appellant, then a 19-year-old Marine, was purportedly captured by enemy forces in the Republic of Vietnam. In 1973, when the majority of American prisoners were repatriated, appellant was not one of them. He returned to United States control in Bangkok, Thailand, on or about March 22, 1979, after flying from Vietnam aboard a regularly scheduled commercial flight. Shortly thereafter, he was charged with various crimes allegedly committed during his absence from U.S. control. The charges were duly investigated and referred to a general court-martial. After a lengthy trial, appellant was convicted of communicating with the enemy and assault on an American prisoner of war, in violation of Articles 104 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 904 and 928, respectively. Appellant was sentenced to be discharged from the Marine Corps with a dishonorable discharge, to forfeit all pay and allowances, and to be reduced to the pay grade of E-1. The convening authority approved the findings and sentence, as did the United States Navy-Marine Corps Court of Military Review. 16 M.J. 863 (1983). We granted review of the following issues:

I

WHETHER THE MILITARY JUDGE ERRED IN REFUSING TO RECUSE HIMSELF AND IN REFUSING TO DECLARE A MISTRIAL AS A RESULT OF JUDICIAL MISCONDUCT.

II

WHETHER THE PROSECUTION OF PFC GARWOOD, IN VIOLATION OF GOVERNMENTAL POLICY NOT TO PROSECUTE PRISONERS OF WAR

WHO HAD VIOLATED THE UCMJ, CONSTITUTED SELECTIVE PROSECUTION, AND THEREFORE DENIED PFC GARWOOD DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS, GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

We resolve both issues adversely to appellant and affirm.

I

The facts of this case have been extensively set forth in *United States v. Garwood, supra.* With reference to the first granted issue, the following excerpt is pertinent:

> During the period December 1980—February 1981, . . . the trial judge engaged in a number of press and media interviews involving both local media representatives as well as correspondents from national television networks.
>
> The settings for the judge's remarks apparently ranged from comments on the case delivered in an interview outside the courtroom, to his appearance, in interviews on a CBS evening television news program, ABC news "Nighttime" program, and individual interviews with correspondents from the national television networks and the Associated Press. The content of his remarks involved the expression of his opinion regarding tactical decisions by the appellant's defense team; the relevancy of certain defense discovery items; comments, delivered to the media, which could be interpreted as disparaging the testimony of one of appellant's psychiatrists; and opinions expressing the view that appellant should take the stand and testify regarding the charges.

On 15 January 1981, appellant's chief civilian counsel moved for dismissal of charges, or alternatively, recusal of the military judge.[1] Appellant's counsel also requested an evidentiary hearing to apparently present testimony of media representatives regarding the public statements of the trial judge. In addition, appellant's counsel desired to present evidence on the concept of "subliminal perception" and the asserted potential for transmittal of the judge's remarks to court members via unconscious reception of third party conversations, news broadcasts, and service club or other social discussions which would refer to the judge's remarks.

Judge Switzer denied defense motions to dismiss or to recuse himself, and denied the defense challenge based upon judicial misconduct. Appellant's counsel also asked for sequestration of the court members. This motion was also denied. Later in the trial, following closing arguments on the findings, appellant's counsel again challenged the trial judge for cause, asserting bias against appellant and judicial misconduct. Appellant's counsel again moved for an evidentiary hearing to present testimony and evidence on the concept of subliminal perception. This motion was also denied by the trial judge. Trial resumed and was carried through to conclusion.

16 M.J. at 868-69.

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[1] Prior to findings, when defense counsel moved for dismissal of the charges or recusal of the military judge, the military judge invited counsel to move for a mistrial as well. However, for various stated reasons, defense counsel declined to so move. After findings of guilty were returned, when counsel renewed his challenge to the judge for cause, he was again invited to move for a mistrial. This time the motion was made, but it was ultimately denied.

A

Appellant contends, before this Court, that the military judge's conduct amounted to error *per se*; that he should have recused himself at trial; and that the conviction should now be set aside, regardless of whether prejudice to his case has been shown. In our view, the issue of judicial misconduct was sufficiently raised to place the burden of persuasion on the Government.

The most pertinent military standard,[2] in effect at the time of appellant's trial, for testing the suitability of a judge to sit on a particular case was paragraph 62*f*, Manual for Courts-Martial, United States, 1969 (Revised edition), which provided:

> Among the grounds of challenges for cause against . . . the military judge are the following:
>
> * * * * * *
>
> (10) That he has formed or expressed a positive and definite opinion as to the guilt or innocence of the accused as to any offense charged, except that this shall not necessarily apply to a military judge who has formed or expressed such an opinion solely in his role as military judge sitting alone in a previous trial of the same or a closely related case.
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> * * * * * *

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[2] 28 U.S.C. § 455 (which is not directly applicable to military practice, *see* 28 U.S.C. § 451 and *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966)), is similar in providing that:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

> (13) Any other facts indicating that he should not sit as a . . . military judge in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality . . . .

See also United States v. Kincheloe, 14 M.J. 40 (C.M.A. 1982).

Judged by these standards, we are satisfied that the military judge's actions did not disqualify him from participating in the trial. To be sure, his comments exceeded the permissible scope of public discussion of an on-going trial by a sitting judge; and quite properly, the Court of Military Review (16 M.J. at 869) has chastised him for violating Canon 3 A(6) of the American Bar Association's Code of Judicial Conduct.[3] *United States v. Garwood, supra* at 869-70; *cf. United States v. Haldeman,* 559 F.2d 31, 134 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977). Nonetheless, a close reading of the record discloses no statement or action by the judge which impugned his integrity, fairness, or impartiality either in general or with respect to this particular case.[4] Further-

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[3] Canon 3 A(6) states:

> A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

[4] Admittedly, it appears that certain of the reporters may have failed at times to grasp the legal significance of some of the military judge's comments. Thus, several of the articles published in local newspapers attributed rather misleading statements to him. Of course, this is a risk a judge runs any time he lets the press question him about a pending case; and it opens up an unnecessary avenue for impermissible matter to come to the attention of court members.

more, there is no suggestion that he had formed or expressed an opinion as to appellant's guilt or innocence.

An instructive case, by way of contrast, is *Mayberry v. Davis*, 608 F.2d 1070 (5th Cir. 1979). There the trial judge, out of the presence of the jury and in response to the petitioner's assertion of innocence, stated that he believed petitioner to be "guilty as sin." The Court of Appeals concluded that "the judge's opinion was clearly based on evidence that had been presented during the course of the trial" and "did not violate any constitutional right of petitioner." *Id.* at 1072.

Manifestly, nothing in the instant case was said by the military judge which even approached the remark in *Mayberry*. The very worst thing that can be said of the judge's comments here is that they too candidly revealed his impressions of the case, based on the information then available to him. Thus, it is our conclusion that the record establishes that, while the military judge erred in speaking out to such an extent, he was not personally compromised or tainted in his role as a neutral and detached magistrate.

B

Given that conclusion, did the judge's public comments nonetheless infect the court-martial proceedings? The Court of Military Review's findings in this regard are germane:

> More importantly, we find, after examining the extensive *voir dire* of the court members; their candid responses regarding attempts by press representatives to interview them; their rebuffs of such attempts; their adamant statements denying both any knowledge or contact with press, radio, or television reports of the case throughout their period of appointment to the court and their denial of any individual, social, or other contact or discussions regarding the case, no

> indication of prejudicial impact on the members of the court.

16 M.J. at 870.

Like the court below, we, too, are impressed with these court members' scrupulous adherence to duty in avoiding media contact. Moreover, as appellate defense counsel concede, there is no evidence that any of the court members ever *consciously* heard or read any descriptions or accounts of the military judge's off-the-record remarks. Rather, their contention is essentially that, inasmuch as such descriptions and accounts appeared periodically in the various media during the pendency of the court-martial, it is almost inevitable that some of this information was conveyed to the court members *subconsciously*—or at least that the Government cannot demonstrate that it was not so conveyed. On this basis, counsel ask this Court to *presume* prejudice and to set aside the conviction.

To bolster this contention defense counsel at trial proffered that an expert witness "would testify that between now and the end of the trial, it's very possible that the members might hear that information and not even realize that they've heard it, receive it at subliminal level, and be affected by it." As previously indicated, the military judge declined to permit such testimony.

To further support this contention, the defense submitted, at the Court of Military Review, an affidavit by the same expert which stated essentially: that "unconscious or subliminal" perceptions are "well-recognized" psychological phenomena; that information received as such can affect "feelings, perceptions, opinions and other rational judgments . . . without" the recipient's knowledge; that the effect of such information can depend "on the credibility of the source"; that "subliminally received information from the mouth of the military judge" would tend

to "have a substantial" impact on the opinion and judgment of a court member, that "[t]here is no way to question a court . . . member about the effect of subliminal perception," since they are "perceived, retained and effective at an unconscious level"; and that if a court member subliminally perceived the military judge as suggesting that appellant needed to take the stand "to have any chance of being acquitted," there was "a substantial risk that the court . . . member would believe those comments to be true." However, it is significant, in our opinion, that there is no suggestion by the expert that such subliminal perceptions would necessarily override the evidence presented to the members in open court or the explicit legal instructions provided by the military judge.

For the purpose of resolving this appeal, we shall accept the validity of the expert's assertions in their entirety. In any event, certain of them strike this Court as self-evident. Nonetheless, we decline to set aside appellant's conviction on this basis, for were we to accept the proposition that unconsciously received perceptions were sufficient to disqualify otherwise qualified court members from participating in courts-martial, then it would appear that relatively few serious crimes could ever be prosecuted before members. Such a result would be too costly, both to society and the accused, and is, moreover, unnecessary.

The system of military justice, like its civilian counterpart, depends heavily on the honesty and integrity of the court members (or jury) to decide cases based only on the law and evidence as presented to them in open court. Admittedly, a perfect trial, as with any other human endeavor, can never be more than the goal. However, within the limitations of human nature, we can expect—and demand—an absolutely first-rate effort on the part of court members. Our review of this record convinces us that appellant received such an effort by these court members. He can reasonably ask for no more. Therefore, even as-

suming that some quantum of subliminal information was received by one or more of the court members, we decline to presume that appellant was prejudiced thereby.

II

The second issue on which review was granted concerns an allegation by appellant that he was unfairly singled out for prosecution, while others in similar circumstances were excused. Again we look to the Court of Military Review for the basic factual context of this issue:

> Appellant presents on his behalf extensive documentation of named members of the U.S. armed forces who were suspected of offenses during the Vietnam conflict, supposedly similar in degree to his own charges, and who were not prosecuted under the court-martial process applied to him. Appellant presents extensive documentation of Defense Department and Navy Department directives and memoranda which present departmental views that those prisoners of war who were returned during the celebrated 1973 "Homecoming" repatriation would not be prosecuted for "propaganda statements" made while in captivity.
>
> There is additional documentation in the form of news reports of statements made by Department of Defense officials, including two Secretaries of Defense. Memorandums from the Secretary of the Navy and the Judge Advocate General of the Navy are offered to support appellant's further contentions that specific decisions were made not to prosecute named members of the naval service, including a senior officer in the Navy, and a senior officer in the Marine Corps, as well as two Marine noncommissioned officers. These servicemen had been the subject of specific charges by other former prisoners of war held in North Vietnam. The

> charges alleged against the two naval service officers involved allegations of communication and cooperation with the enemy, making of propaganda statements, inducing of insubordination by their fellow prisoners against senior U.S. officers interned in the camp, and informing on fellow prisoners of war. The charges alleged against the two Marine noncommissioned officers involved allegations of making propaganda statements, communication with the enemy, disobeying orders, and acceptance of favors from the enemy. Certainly Private First Class Garwood has presented extensive evidence of other former prisoners of war who were allegedly violators of the Code while in captivity.

United States v. Garwood, supra at 871.

In essence, appellant contends, as he did at trial, that a form of amnesty or pardon, actual or *de facto,* existed which operated to the benefit of several other former prisoners of war and should have applied to him as well. Appellant's contention was litigated extensively at trial and, in the end, was decided adversely to him by the military judge.

"Pardon" is defined as

> forgiveness, release, remission: forgiveness for an offense, whether the person committing it is liable in law or otherwise; release from pecuniary obligation; or remission of a penalty to which one may have subjected himself by the non-performance of an undertaking, contract, or statutory obligation.

On the other hand:

> Amnesty is defined . . . [as] an act of the sovereign power granting oblivion, or a general pardon for a past offense, and is rarely, if ever, exercised in favor

> of single individuals, but is usually exerted in behalf of certain classes of persons who are subject to trial but have not yet been convicted.

59 Am Jur 2d, *Pardon and Parole,* §§ 3 and 5 (footnotes omitted). *See United States v. Batchelor,* 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956).

The evidence of record leaves absolutely no doubt that there was a limited *policy* of nonprosecution for propaganda statements. Indeed, it is clear that what constituted propaganda statements was to be construed liberally to include related conduct that would not ordinarily fall into that category. This policy was carefully developed and coordinated by high-level officials during President Richard M. Nixon's administration and was based on legal and political, as well as humanitarian, considerations. However, it is equally clear, as the military judge found, that no *amnesty* or *pardon,* as such, issued for crimes committed by servicemembers while prisoners of war in Vietnam.

A question that immediately presents itself then is: does one administration's policy of forbearance from prosecution extend through the next administration and into a third and fourth administration[5], so as to preclude subordinates of the latter two administrations from exercising

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[5] We take judicial notice that Richard M. Nixon's second term of office as President of the United States began on January 20, 1973, and ended on August 9, 1974. Thus, he was in office during the 1973 "Operation Homecoming," when supposedly all of the American P.O.W.'s were released from Vietnam. Gerald R. Ford's term of office as President ran from August 9, 1974, to January 20, 1977. Jimmy Carter's term of office as President commenced on January 20, 1977, and terminated on January 20, 1981. Thus, he was President when appellant was repatriated and during the majority of his court-martial. Ronald Reagan assumed office on January 20, 1981, and was still President when appellant's sentence was adjudged on February 17, 1981.

their statutorily conferred prerogatives?[6] We think the answer to this question is, self-evidently, no.

But in any event, the following is well-established:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974). *See Wayte v. United States*, —— U.S. ——, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985); *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962); *United States v.* Ross, 719 F.2d 615 (2d Cir. 1983); *United States v. Greene*, 697 F.2d 1229 (5th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 3542, 77 L.Ed.2d 1391 (1983); *United States v. Torquato*, 602 F.2d 564 (3d Cir.), *cert. denied*, 444 U.S. 941, 100 S.Ct. 295, 62 L.Ed.2d 307 (1979); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973), (en banc); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972).

Since appellant was repatriated long after the other American prisoners, we have some doubt whether he even makes a colorable claim that there were others similarly situated against whom his treatment can be measured. However, we need not rest our decision on that ground,

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[6] We note that there is absolutely no indication in the record that this limited policy of nonprosecution was ratified or extended by the Carter administration, under which the charges were ultimately brought against appellant.

since there is simply no evidence of "bad faith" or "invidious" prosecution, as defined in *Berrios. See Wayte v. United States, supra,* 105 S.Ct. at 1531-32. It follows that appellant has not been the victim of discriminatory or selective prosecution and that is equal-protection and due-process rights have not been violated.

Accordingly, the decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge EVERETT and Judge FLETCHER concur.

APPENDIX B

U.S. NAVY - MARINE CORPS COURT OF MILITARY REVIEW.

UNITED STATES

v.

Robert R. GARWOOD, 314 46 3268,
Private First Class (E-2), U.S.
Marine Corps.

NMCM 81 1892

Sentence Adjudged 17 Feb. 1981.

Decided 29 July 1983.

Accused was convicted by general court-martial of aiding enemy forces within prisoner of war camps and assault of American prisoner of war, and he appealed. The Navy-Marine Corps Court of Military Review, May, J., held that: (1) trial judge erred in engaging in a number of press and media interviews involving both local media representatives and correspondents from national television networks, but the judicial misconduct did not require recusal of trial judge, because there was no indication of the slightest deterioration of the formality or decorum mandated for courts-martial, there was no showing of prejudicial impact upon court members, and trial judge's extrajudicial comments did not reflect any bias or predilection against accused; (2) prosecution of accused was not selective prosecution in violation of accused's due process and equal protection rights, because the decision to prosecute accused on the charges did not infringe upon constitutionally protected activity on accused's part, and, although accused was convicted only of aiding the enemy charge

and assault, and there was evidence that other members of armed forces allegedly committed offenses similar to those of which accused was convicted, Government sufficiently established, under a compelling evidence standard, that it prosecuted accused without unlawful discriminating purpose and without violation of accused's due process rights; and (3) trial judge's rulings on accused's discovery request did not deny accused adequate discovery or relevant or potentially relevant evidence.

Affirmed.

Before EOFF, C.J., SANDERS, Senior Judge, and MAY, J.

MAY, Judge:

This case involves a highly publicized chain of circumstances set in motion by the disappearance of a 19 year old Marine from his unit, then stationed in the Republic of South Vietnam (RVN), on 28 September 1965. Almost 14 years later, following an encounter with a representative of the United Nations in a hotel cocktail lounge in North Vietnam, Private First Class Robert R. Garwood, age 33, was returned to U.S. military control.

The allegations and subsequent charges attendant to his period of absence in Vietnam resulted in a trial involving 92 trial days, litigated over a time period in excess of 11 months and producing 16 volumes of trial record and exhibits and containing 3,833 pages of trial transcript. It also involved the judicially permitted withdrawal of both initially appointed military defense counsel, the appointment of replacement associate military defense counsel, the subsequent dismissal by Private First Class Garwood of his initially retained civilian counsel, and the retention by Private First Class Garwood of new individual civilian counsel.

On 5 February 1981, Private First Class Garwood, contrary to his pleas, was convicted by general court-martial, officer members, of aiding enemy forces within prisoner of war camps in the Republic of South Vietnam, in violation of Article 104, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 904, and of assault of an American prisoner of war interned in an enemy prisoner of war camp, in violation of Article 128, UCMJ, 10 U.S.C. § 928. On 13 February 1981, Private First Class Garwood was sentenced to a dishonorable discharge from the naval service, forfeiture of all pay and allowances, and reduction to private, pay grade E-1.

The findings and sentence were approved on review below.

Appellant now assigns eight errors, none of which we find meritorious. Four of these assignments, however, warrant discussion.

I

THE MILITARY JUDGE ERRED IN REFUSING TO RECUSE HIMSELF AND REFUSING TO DECLARE A MISTRIAL AS A RESULT OF JUDICIAL MISCONDUCT.

II

THE PROSECUTION OF PFC GARWOOD, IN VIOLATION OF GOVERNMENTAL POLICY NOT TO PROSECUTE PRISONERS OF WAR WHO HAD VIOLATED THE UCMJ, CONSTITUTED SELECTIVE PROSECUTION, AND THEREFORE DENIED PFC GARWOOD DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS, GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

V

APPELLANT WAS DENIED AN EFFECTIVE PSYCHIATRIC EVALUATION, IN VIOLATION OF ARTICLE 121 OF THE MANUAL OF [SIC] COURT-MARTIAL.

VII

THE TRIAL COURT DENIED APPELLANT HIS RIGHT TO DISCOVERY OF EXCULPATORY EVIDENCE, WHICH DEFENSE REQUESTED UNDER *BRADY V. MARYLAND.*

In addressing these assignments of error, it is necessary to provide the significant factual background of this case as extracted from the record:

Factual background

Appellant was a 19 year old Marine private first class stationed near Da Nang, RVN, in 1965. At that time appellant was a member of Service Company, Headquarters Battalion, Third Marine Division. As a driver in his motor transport platoon he was dispatched on the evening of 28 September 1965 to pick up an officer scheduled to depart Vietnam on emergency leave. The location of the officer was apparently at some distance from appellant's command compound outside Da Nang. Private First Class Garwood was last seen by those in authority within his unit at approximately 1800, 28 September 1965.

Almost fourteen years later, a representative of a United Nations delegation visiting the Socialist Republic of Vietnam was passed a note from appellant while sitting in a hotel lounge. That note advised the delegate of appellant's Marine Corps identity. This communication culminated in the return of appellant to United States military control on 22 March 1979.

Although appellant's official return to U.S. control occurred on the above date, his presence within the prisoner of war camp network in South Vietnam was apparently known or suspected by U.S. authorities within weeks of his disappearance, based initially on routine intelligence reports and later, on information supplied by repatriated American servicemen who had been prisoners of war in camps located in South Vietnam.

Subsequent to appellant's return to U.S. Military control, he was assigned for duty at Marine Corps Base, Camp Lejeune, North Carolina. Prior and subsequent to his return, government criminal investigative agencies were evaluating allegations of possible criminal offenses committed by appellant following his disappearance from his unit. Following a pretrial investigation ordered by the Commanding General Marine Corps Base, Camp Lejeune, North Carolina, in accordance with Article 32, UCMJ, appellant was charged with desertion, in violation of Article 85, UCMJ, 10 U.S.C. § 885; solicitation of U.S. troops in the field to refuse to fight and to defect, in violation of Article 82, UCMJ, 10 U.S.C. § 882; communication and holding intercourse with the enemy, in violation of Article 104, UCMJ; and misconduct as a prisoner of war, in violation of Article 105, 10, U.S.C. § 905, UCMJ. We hasten to emphasize that, following presentation of the case in chief, the military judge in this case granted appellant's motion for findings of not guilty, in regards to the desertion and solicitation charges, and one specification of the maltreatment charge. The members, in arriving at their findings regarding the remaining charges, found appellant guilty of the holding intercourse and communication with the enemy charge and not guilty of the remaining maltreatment specification, but guilty of assault.

The charges in this case essentially involved *allegations* that, subsequent to his disappearance from his unit in September 1965, appellant had, in various enemy prisoner

of war camps in South Vietnam, during the period 1967-1969, elected to communicate with and hold intercourse with enemy military forces. The specific activities alleged against appellant involved acting as an interpreter during political indoctrination classes given to American prisoners by enemy personnel; acting as an informer to enemy captors regarding prohibited activities of American prisoners; serving as an interrogator of American prisoners upon their initial entry into the camps; serving as an indoctrinator and discussion leader of American prisoners of war and encouraging prisoners to accede to communist ideology as presented by their captors in exchange for moderation of treatment and early release; and serving as an armed escort over prisoners of war. Appellant was further charged with assault of an American prisoner of war following an incident in which an enemy camp commander's cat had been killed for food by American prisoners of war.

The government's evidence in its case in chief consisted essentially of the testimony of former American prisoners of war, all present or former U.S. Army personnel, and one former South Vietnamese Marine officer, all of whom allegedly were interned in prisoner of war camps in RVN and who testified as to appellant's activities during their periods of internment.

Following presentation of the government's case in chief, appellant offered into evidence extensive psychiatric testimony. This testimony involved the concepts of "coercive persuasion," "atypical dissociative reaction," and "post-traumatic stress syndrome." In essence, the expert witnesses presented by appellant contended that, based on their evaluations, appellant had been the victim of levels of torture and brutality during his initial period of incarceration by the enemy sufficient to coercively cause him to adopt an identity totally separate and apart from his conscious, controlling state of mind, and that this separate

identity or "dissociative reaction" made it physically possible for the alleged offenses to have been committed by him without the requisite linkage to the necessary perceptive and controlling faculties required under the principles of mental responsibility contained in *United States v. Frederick*, 3 M.J. 230 (C.M.A.1977). In short, appellant's psychiatric evidence characterized appellant as suffering from a mental disease at the time of the alleged offenses which rendered him not responsible under the principles of *Frederick*. This evidence also was offered in support of a contention of partial impairment of his perceiving and controlling faculties in relation to those alleged offenses which involved specific intent or knowledge as requisite elements of proof.

In rebuttal, the government presented testimony by three Navy psychiatrists who testified generally that, in their opinion, appellant suffered from a "dysthymic disorder" which impacted as "mild to moderate depression." These government psychiatrists also opined that appellant possessed an "avoidant personality." The Navy psychiatrists testified that they found no atypical dissociative disorder symptoms and that they found appellant, at the time of the alleged offenses, possessed the mental capacity to appreciate the criminality of his actions and to conform his conduct to the requirements of the law. *Frederick, supra.* In short, the government's psychiatric evidence characterized appellant as mentally responsible at the time of the alleged offenses.

We do not intend, by the above summation, to simplistically assign the respective contentions of appellant and the government in this case to convenient states of psychiatric equilibrium. On the contrary, the psychiatric evidence encompassed over 600 pages of the trial record for presentation, cross-examination and redirect examination of the defense psychiatric witnesses, and over 150 pages of the trial record for presentation, cross-examination and re-

direct examination of government psychiatric witnesses. We find, however, from our examination of the record, sufficient evidence to sustain the members apparent rejection of Private First Class Garwood's insanity defense. We will now address Assignments of Error I, II, V, and VII.

I

THE MILITARY JUDGE ERRED IN REFUSING TO RECUSE HIMSELF AND REFUSING TO DECLARE A MISTRIAL AS A RESULT OF JUDICIAL MISCONDUCT.

On the first day of the 92 days of trial, during preliminary proceedings of this case, the trial judge issued a written judicial order, "Order on Courtroom Procedures and Publicity," a portion of which we find relevant here:

> 8. All witnesses, persons subpoenaed to court, court-members and those persons appointed but excused from serving as members, as well as all persons selected as potential court-members, are forbidden to participate in interviews for publicity and from making any extrajudicial statements about the case from this date and until such time as a verdict in this case is returned in open court. Nothing in this order shall prohibit any witness from discussing any matter in connection with the case with any of the counsel or the accused or any representative of such counsel.
>
> 9. Extrajudicial statements by any counsel, witness, or any one party, directly or indirectly for either side, is hereby prohibited. No release to any of the news media may be made of any leads, information or gossip by government officials, witnesses, or counsel for either side or their agents and employees. Nothing herein contained is intended to prohibit interviews for pub-

licity so long as extrajudicial statements about the case are not made.

The above two extracted paragraphs as well as the rest of the judicial order represented a well-drafted and comprehensive judicial directive. The trial judge, Judge Switzer, had obviously appreciated the problems of publicity and media demands for information ranged against the rights of appellant and the necessity for a fair trial inherent in this case from the day the alleged charges were subjected to formal pretrial investigation.

From our examination of the record, we find the trial judge's decision to issue the restrictive order to be justified.

He had properly, and with adequate justification, taken judicial notice in his restrictive order of the extensive media publicity related to this case. This order was an obvious and proper response to the clash between the public's right to information, the press's access to the trial proceedings, and Private First Class Garwood's right to a fair trial. We find that this restrictive order was a proper response to the "reasonable likelihood" that pretrial and trial publicity could have interfered with a fair trial. *See Sheppard v. Maxwell,* 384 U.S. 333, 363, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966); *United States v. Tijerina,* 412 F.2d 661, 666-67 (10th Cir.1969), *cert. denied,* 396 U.S. 990, 90 S.Ct. 478, 24 L.Ed.2d 452 (1969).

During the period December 1980—February 1981, however, the trial judge engaged in a number of press and media interviews involving both local media representatives as well as correspondents from national television networks.

The settings for the judge's remarks apparently ranged from comments on the case delivered in an interview outside the courtroom, to his appearance, in interviews on a

CBS evening television news program, ABC news "Nighttime" program, and individual interviews with correspondents from the national television networks and the Associated Press. The content of his remarks involved the expression of his opinion regarding tactical decisions by the appellant's defense team; the relevancy of certain defense discovery items; comments, delivered to the media, which could be interpreted as disparaging the testimony of one of appellant's psychiatrists; and opinions expressing the view that appellant should take the stand and testify regarding the charges.

On 15 January 1981, appellant's chief civilian counsel moved for dismissal of charges, or alternatively, recusal of the military judge. Appellant's counsel also requested an evidentiary hearing to apparently present testimony of media representatives regarding the public statements of the trial judge. In addition, appellant's counsel desired to present evidence on the concept of "subliminal perception" and the asserted potential for transmittal of the judge's remarks to court members via unconscious reception of third party conversations, news broadcasts, and service club or other social discussions which would refer to the judge's remarks.

Judge Switzer denied defense motions to dismiss or to recuse himself, and denied the defense challenge based upon judicial misconduct. Appellant's counsel also asked for sequestration of the court members. This motion was also denied. Later in the trial, following closing arguments on the findings, appellant's counsel again challenged the trial judge for cause, asserting bias against appellant and judicial misconduct. Appellant's counsel again moved for an evidentiary hearing to present testimony and evidence on the concept of subliminal perception. This motion was also denied by the trial judge. Trial resumed and was carried through to conclusion.

We find inexcusable the decision by the trial judge here to involve himself in the clearly predictable media interest and inquiry in this case. The Canons of Judicial Conduct certainly explicitly bar such behavior:

> A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the *procedures* of the court. Canon 3 A(6). (emphasis added)

Judge Switzer, an experienced trial judge, was perhaps well-motivated in his desire to "inform" the press and public regarding a highly publicized trial, a trial involving all the complexities of old political issues, national policies in an unpopular war, and the adequate protection of appellant's right to a fair trial on the charges, under the law.

We can certainly discern from the record Judge Switzer's apparent motivation for his decisions to grant press and visual media interviews:

> Now, again, I recognize that judges ought to not talk about a case in proceeding but . . . or that is pending; however, I have tried to be available to all members of the media as well as either side for that matter, to try to explain the military law or my rationale and reason for ruling.

Regardless of the trial judge's motivation for his or her decision to provide access to press representation, the press does not carry the responsibility borne by the trial judge to insure that a fair and impartial trial is conducted. There is very simply, no justification or excuse which can be raised in defense of the judge's violation of his own di-

rective. If he did not intend that his directive barring all press and media interviews should apply to himself, then he should have certainly explained his interpretation and intentions on the record to provide an opportunity for counsel of both sides to raise appropriate concerns. While the accused and his counsel are understandably concerned in the conduct of appropriate trial proceedings within statutory and constitutional safeguards, trial counsel must also be constantly aware of potential dangers to the validity and lawful tenor of the trial proceedings.

Appellant now assigns error, contending that the trial judge's conduct violated the Canons of Judicial Conduct, that the potential for unconscious, "subliminal" perceptions by the court-members of the trial judge's extrajudicial comments and opinions irretrievably tainted the proceedings in the case, and that the circumstances therefore mandate reversal of the findings and sentence and dismissal of the charges.

We have extensively examined the trial record and the detailed *voir dire* conducted at significant stages of the trial, particularly that conducted following defense addressal of the publicized comments of the trial judge.

We have examined appellant's extensive brief, the affidavit of a proffered psychiatrist regarding the concept of "subliminal perceptions," and we have considered appellant's civilian and military counsel's oral argument on this issue.

We find that the trial judge here clearly erred in engaging in such ill-considered publicity statements. Although we express our upmost disapproval of Judge Switzer's proclivities toward media activity, we do not thereby end our assessment.

We first find no indication, in either the trial record proffers of expected evidence by appellant's counsel, or

in his appellate assertions, of the slightest deterioration of the necessary formality and decorum mandated for courts-martial under the Code. On the contrary, we find that the trial judge maintained continual and necessary control throughout the extensively publicized proceedings and that none of the obvious media interest was allowed to intrude upon, or detract from, the trial itself.

More importantly, we find, after examining the extensive *voir dire* of the court members; their candid responses regarding attempts by press representatives to interview them; their rebuffs of such attempts; their adamant statements denying both any knowledge or contact with press, radio, or television reports of the case throughout their period of appointment to the court and their denial of any individual, social, or other contact or discussions regarding the case, no indication of prejudicial impact on the members of the court.

Contentions of the possibility of "subliminal perception" unconsciously impacting on the thought processes of the court members are not, after considering all the evidentiary proffers of appellant's counsel, sufficiently persuasive. The concept does not possess adequate scientific foundation, in our view, under the circumstances of this case, and we do not agree that subliminal perception as "a well-documented phenomenon" is relevant to this case. We find no reason to disbelieve the forthright assertions of the court members that they scrupulously observed the judge's standing order to avoid all discussion, contact with, or proximity to news reports, conversations, or press notices regarding the case. We specifically reject appellant's counsel's "proffer" that a media representative supposedly overheard a junior officer, who was not a court member, expressing negative opinions about appellant in the base officer's club within close physical proximity to several of the court members. We are instead persuaded by the statements of the members on the trial record during *voir dire*

examinations, subsequent to this alleged event, and find no basis for the assertion of prejudicial impact upon appellant or the trial process.

We also reject appellant's counsel's contention at trial and now, that the trial judge's extrajudicial comments reflected any bias or predilection against appellant. We certainly find no indication of bias in the trial record. Finally, we are not persuaded by appellant's latest alternative contention that, in the event we reject the concept of subliminal perception, reversal is mandated to "protect the rights of future defendants and to protect the military itself against accusations of bias." This Court has stood and will always stand ready to carry out its statutory responsibilities and to protect the rights of defendants appearing before courts-martial of the naval service. In regards to concerns about "protecting" the military services from bias charges, we find no statutory, case law or appellate review concepts which elevate appellant's assumed well intentioned concerns to legitimate considerations for this Court.

We, therefore, find no merit in this assignment and find that the trial judge did not abuse his discretion in his denial of defense motions for mistrial and challenge for cause against the military judge.

II

THE PROSECUTION OF PFC GARWOOD, IN VIOLATION OF GOVERNMENTAL POLICY NOT TO PROSECUTE PRISONERS OF WAR WHO HAD VIOLATED THE UCMJ, CONSTITUTED SELECTIVE PROSECUTION, AND THEREFORE DENIED PFC GARWOOD DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS, GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellant now renews his contention, raised initially at the trial level in a motion to dismiss, that his prosecution was in violation of his Fifth Amendment due process rights. Appellant persuasively founds his position on principles presented in *Yick Wo v. Hopkins,* 188 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), and subsequent case law which essentially bars the prosecution of persons under federal, state, or local law when such prosecutorial decision is based upon illegal discrimination between persons similarly liable for their alleged criminal conduct.

Appellant correctly does not assert the application of de jure statutes whose discriminatory purpose is self-evident. On the contrary, the Code violations here clearly present nondiscriminatory statutory proscriptions against criminal conduct by all persons subject to the Uniform Code of Military Justice.

While appellant asserts properly his Fifth Amendment due process rights on this issue, the principles of equal protection generally expressed in state and local law applications is applicable under similar circumstances and concomitant with due process concepts when federal executive power is at issue. *Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

Prima Facie Threshold

Appellant presents on his behalf extensive documentation of named members of the U.S. armed forces who were suspected of offenses during the Vietnam conflict, supposedly similar in degree to his own charges, and who were not prosecuted under the court-martial process applied to him. Appellant presents extensive documentation of Defense Department and Navy Department directives and memoranda which present departmental views that those prisons of war who were returned during the celebrated 1973 "Homecoming" repatriation would not be

prosecuted for "propaganda statements" made while in captivity.

There is additional documentation in the form of news reports of statements made by Department of Defense officials, including two Secretaries of Defense. Memorandums from the Secretary of the Navy and the Judge Advocate General of the Navy are offered to support appellant's further contentions that specific decisions were made not to prosecute named members of the naval service, including a senior officer in the Navy, and a senior officer in the Marine Corps, as well as two Marine noncommissioned officers. These servicemen had been the subject of specific charges by other former prisoners of war held in North Vietnam. The charges alleged against the two naval service officers involved allegations of communication and cooperation with the enemy, making of propaganda statements, inducing of insubordination by their fellow prisoners against senior U.S. officers interned in the camp, and informing on fellow prisoners of war. The charges alleged against the two Marine noncommissioned officers involved allegations of making propaganda statements, communication with the enemy, disobeying orders, and acceptance of favors from the enemy. Certainly Private First Class Garwood has presented extensive evidence of other former prisoners of war who were allegedly violators of the Code while in captivity. More is required, however, when asserting that one has been "selectively prosecuted."

We first note that bare contentions that others were similarly liable due to criminal activity, but not prosecuted, are insufficient to bar good faith prosecutions. *Cf. United States v. Rickenbacker,* 309 F.2d 462 (2d Cir.1962) (defendant was properly convicted of refusing to complete and submit housing census questionnaire although he established that, although other persons had also refused to submit form, he was only person prosecuted); *United States v. Elliott,* 266 F.Supp. 318 (S.D.N.Y.1967) (motion

to dismiss conspiracy indictment properly denied even though defendant established that no other person had ever been charged with violation of a statute enacted in 1917). "Mere failure to prosecute other offenders is no basis for a finding of denial of equal protection." *Moss v. Hornig,* 314 F.2d 89, 92 (2d Cir.1963).

In the face of contentions of selective prosecutions, there is a general presumption that criminal charges and prosecutions are undertaken in good faith and with nondiscriminatory motivation. *United States v. Falk,* 479 F.2d 616 (7th Cir.1973). The two-prong test of the *prima facie,* selective prosecution defense is: (1) that others similarly situated have not been prosecuted for similar conduct and (2) that the government's decision to prosecute was based on impermissible grounds, such as race, religion, or other arbitrary classification. *United States v. Berrios,* 501 F.2d 1207 (2d Cir.1974). At this point, we are unable to discern a material basis asserted by appellant regarding the second prong, i.e. impermissible or arbitrary classification. However, given the unique nature of this case, we are inclined to grant appellant the achievement of a *prima facie* threshold for resolution of this issue. We are motivated in this regard by appellant's evidentiary submissions and an equitable desire to insure adequate addressal of this obvious issue.

Achievement of the *prima facie threshold,* however, does not represent meritorious resolution of appellant's assignment. The next level of inquiry is necessarily directed at the burden of proof necessary to sustain his dismissal motion, and upon whom does that burden of persuasion lie.

Burden of Proof

The *Manual for Courts-Martial, 1969 (Rev.)* (MCM), is explicit in its assignment of the requisite burden when motions or defenses are raised in a bar to trial. The bur-

den is upon the accused at trial with certain exceptions, such as insanity and statute of limitations issues, to support, by a preponderance of evidence, a motion asserting a defense or bar to trial. Paragraph 67*e*, MCM.

In the area of selective prosecution litigation, however, federal case law provides more specific analytical focus. When the circumstances of the case and, specifically, when curtailment or infringement of constitutionally-protected activity is involved, the burden of persuasion understandably shifts. *United States v. Falk, supra; United States v. Crowthers,* 456 F.2d 1074 (4th Cir.1972). Both of these cases involved the exercise of First Amendment rights. In *Falk,* the defendant was involved in anti-war activism and the counseling of persons desiring to evade military service during the Vietnam War period. The defendant established that these activities were protected by the First Amendment; that the indictment against him was approved in sequence by the Chief of the Criminal Division in the local U.S. Attorney's office; the United States Attorney, and finally by the Department of Justice in Washington, D.C. The defendant further established that a questionable delay was involved in bringing the indictment against him, with the motivation apparently linked to anti-war activities. In *Crowthers,* members of a religious group had been arrested for conducting a "Mass of Peace" on the Pentagon concourse and for distributing leaflets and handbills. In each case it was held that when such constitutionally-protected activity related to First Amendment rights is involved and the *prima facie* threshold is achieved by the accused's evidentiary offers of selective prosecution, the burden then clearly shifts to the government to establish by a "compelling evidence" standard that it has prosecuted without invidious or unlawful discrimination. *Falk, supra* at 624; *Crowthers, supra,* at 1080.

Was appellant here the subject of arbitrary or unlawful classification?

We note examples of assertions of "arbitrary classifications" which have been rejected: *United States v. Ojala,* 544 F.2d 940 (8th Cir.1976); *United States v. Peskin,* 527 F.2d 71 (7th Cir.1975), "political prominence" and public violations of law held permissible basis of government's decision to prosecute; *United States v. Sacco,* 428 F.2d 264 (9th Cir.1970), suspicions of extensive, general organized crime activity was a permissible basis for related prosecution of specific offenses. *See also United States v. Schullo,* 390 F.Supp. 1067 (D.Minn.1975), "general criminal activity" not an arbitrary classification; *United States v. Malinowski,* 347 F.Supp. 347 (E.D.Pa.1972), prosecution of war tax resistance league member not based on any general government "policy" or politically motivated.

It is evident, in our view, that the motivations encompassed within the term "arbitrary classifications" are those categories sufficiently recognizable or objectively linked to those constitutional guarantees inherent in the protections accorded members of racial and religious groups, or those traditionally granted the mantle of judicial protection, as in First Amendent applications.

Appellant presently contends that the very fact that he was prosecuted and others suspected of similar offenses were not, is sufficient to render the prosecutorial decision, in and of itself, irrational and arbitrary. We do not dispute the principle proffered by appellant that a decision to prosecute criminal charges must rest upon an objective standard of reasonableness. We turn then to an inquiry regarding the similarity of the charges in this case and those of other servicemen cited by appellant.

The specific circumstances of this case are an appropriate reference point to determine the extent, if any, of arbi-

trariness, or unlawful classification here. To examine the government's actions, we do not view, as does appellant, the charges as they stood at the *conclusion* of trial. The inquiry as to the preliminary power of the government to bring to bear its prosecutorial authority must, of necessity, be focused on the initial stance of the case and the original substance of criminal allegations from which the decision to prosecute flowed.

Whether the appellant now stands convicted only of communication and intercourse with the enemy and simple assault is, contrary to appellant's counsel's assertions, irrelevant to the issue of selective prosecution. The appropriate point of inquiry is the date the convening authority acted to refer the charges to trial, 13 February 1980, for that is the date at which point the government was invested with the power to formally prosecute appellant. *See* Articles 17, 18, and 22, UCMJ, 10 U.S.C. §§ 817, 818, 822.

At that point in time, from our examination of the record, the appellant, in compliance with Article 30 of the Code, 10 U.S.C. § 830, had been *charged* with:

> Violation of Article 82: Solicitation of U.S. forces at fire support bases, I Corps area, Republic of Vietnam, to throw down their arms and to refuse to fight, as well as appealing to U.S. forces in the field to defect to the enemy.
>
> Violation of Article 85: Desertion in time of war from 28 September 1965 until 22 March 1979.
>
> Violation of Article 104: Aiding the enemy by serving as interpreter, interrogator and indoctrinator in enemy prisoner of war camps; soliciting American prisoners of war to defect to the enemy cause, and serving as a guard over prisoners in enemy prisoner of war camps.

Violation of Article 105. Maltreatment of two American Prisoners of war by physical and verbal abuse, respectively.

We specifically emphasize that appellant was only convicted of the Article 104 aiding the enemy charge and Article 128 assault. (The military judge granted a motion for a finding of not guilty as to the Article 82 and Article 85 charges and one specification alleging verbal maltreatment under Article 105.)

However, in evaluating the government's prosecutorial decision in this case, it is evident that the *alleged charges* represented offenses of substantial and grave magnitude at the time of their preferral and were sufficiently distinguishable from the cases of other servicemen cited by appellant.

The charges, following compliance with Articles 32 and 34, 10 U.S.C. § 834, of the Code, were referred to trial by the Commanding General, Marine Corps Base, Camp Lejeune, North Carolina, the general court-martial convening authority over the command to which appellant was assigned upon his return to U.S. military control. There is not the slightest indication in the trial record and accompanying documentation that the convening authority acted at the behest, suggestion, or command, of any other higher or related authority. Nor is there any indication that the convening authority, in rendering his referral decision, utilized any invidious purpose, vindictive intent, or arbitrary categorization or classification in referring this case to trial by general court-martial.

We find, therefore, that the circustances of this case, as related to the charged offenses, are clearly distinguishable from the obvious circumstances related to First Amendment activities or activities of traditional constitutional priority.

Appellant surely will not be heard to assert that the decision to prosecute him on the above sworn charges and violations of the UCMJ was in any way an act infringing upon constitutionally-protected activity on his part.

Ruling on motion to dismiss due to 'selective prosecution'

First, we find on rational basis grounds, that the decision to prosecute appellant was not arbitrary, nor was that decision motivated by unlawful or impermissible classifications.

Second, in applying the "preponderance of evidence burden" prescribed in paragraph 67*e, MCM,* we find that appellant has not established by a preponderance of the evidence that the government has selectively prosecuted him in violation of his Fifth Amendment due process rights.

However, we have also considered appellant's contention that other members of the armed forces of this nation, some significantly senior in rank and experience, while subject to the Code, allegedly committed offenses similar to those of which he was *convicted* and who were not the subject of court-martial action.

This presents, in our view, a possible constitutional issue of basic fairness or specific due process, which arguably rises to the plane occupied by the First Amendment issues held to merit a shifting of the burden of persuasion in the *Falk* and *Crowthers* cases.

We, therefore, have also applied, in the interest of justice, the higher "compelling evidence" burden to the evidence offered by the government on this motion and we find that the government sufficiently established, under a "compelling evidence" standard, that it prosecuted appellant without unlawful discriminating purpose and without violation of appellant's due process rights.

We, therefore, find this assignment to be without sufficient merit.

V

APPELLANT WAS DENIED AN EFFECTIVE PSYCHIATRIC EVALUATION, IN VIOLATION OF ARTICLE 121 OF THE MANUAL OF [SIC] COURT-MARTIAL.

We have examined the approximately 140 pages of the trial transcript which contained the extensive examination by both sides of the government psychiatrists who served on the Article 121 Board. We find specifically from our examination of the record:

1. That Private First Class Garwood was not inhibited in any material aspect by the giving of Article 31, UCMJ, 10 U.S.C. § 831, rights by each of the Navy psychiatrists who conducted individual psychiatric interviews of him. The extensive character of the responses attributed to Private First Class Garwood, following an understandable period of adjustment and establishment of communication, refutes appellant's counsel's contentions that the requirement to give Article 31 rights, as contained on the trial judge's order, "chilled" the responses of Private First Class Garwood during these psychiatric interviews.

2. That the Navy psychiatrists who conducted the 121 Board evaluation were sufficiently experienced and trained in the field of psychiatry. Appellant's asserted desire to have members appointed to the Board "with expertise in evaluating the defense of coercive persuasion" rests on no known authority. On the contrary, we find sufficient compliance with paragraph 121, *MCM*. We note that the Manual requires only one member of the board to be a psychiatrist. Here, each of the members was a psychiatrist, each had some experience in specific psychiatric examination of former prisoners of war, and each member spent ap-

proximately eight hours in interviewing Private First Class Garwood over a period of three days, for an approximate total of 27 hours of psychiatric examination further reinforced by psychological testing.

From our examination of the record, each of the Navy psychiatrists was, in our view, sufficiently conversant with the concept of "coercive persuasion" to reasonably evaluate and render a professionally competent opinion thereon. While we appreciate appellant's desire to have members possessing an interest and specific "expertise" in a psychiatric area consonant with his specific mental defense, such desire cannot be elevated to a mandatory qualification. *United States v. McGhee,* 36 C.M.R. 785, 794 (N.B.R.1966).

We, therefore, reject this assignment of error.

VII

THE TRIAL COURT DENIED APPELLANT HIS RIGHT TO DISCOVERY OF EXCULPATORY EVIDENCE, WHICH DEFENSE REQUESTED UNDER *BRADY V. MARYLAND.*

We very simply, after examining the entire transcript of proceedings which encompassed a time period of 11 months, and reflected adequate, extensive, and reasonable responses to discovery requests submitted by appellant's counsel, find no merit to the present contention by appellant's counsel that he was denied adequate discovery of relevant or potentially relevant evidence. *See United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

We specifically find no abuse of discretion in the trial judge's decisions limiting defense discovery to that provided and now contained in the trial record.

Court's Action on the Findings and Sentence Below

After our examination of this record, the comments of Private First Class Garwood's defense counsel in his response to the staff judge advocate's review, the assignments of error, and the government's reply thereto, we conclude that the findings are correct in law and fact and that no error materially prejudicial to the substantial rights of appellant was committed. Accordingly, the findings and sentence, as approved on review below, are affirmed.

Chief Judge EOFF and Judge SANDERS concur.

APPENDIX C

From: Michael J. Saks, Ph.D., Department of Psychology, Boston College, Chestnut Hill, Massachusetts 02167

To: Captain Joseph M. Poirier, USMC, Appellate Defense Division Navy-Marine Appellate Review Activity, Washington Navy Yard-Bldg. 200, Washington, D. C. 20374

Subj: Size of judicial decision-making body in military trials

Ref: (a) Hare, A. P., *Handbook of Small Group Research.* New York: Free Press (1976).

(b) Havron, M.D., Et al., *The Effectiveness of Small Military Units.* Washington, D.C.: The Adjutant General's Office, Personnel Research Section (1952) (PRS Rep. 980)

(c) McGrath, J.E., and Altman, I., *Small Group Research.* New York: Holt (1966).

(d) Saks, M. J., The Limits of Scientific Jury Selection: Ethical and Empirical, 17 *Jurimetrics Journal* 3022 (1976).

(e) Saks, M. J., *Jury Verdicts.* Lexington, MA: D. C. Heath (1977).

(f) Saks, M. J., and Hastie, R., *Social Psychology in Court.* New York: Van Nostrand Reinhold (1978).

(g) Stouffer et al., *The American Soldier.* (Part of series, Studies in social psychology in World War II). Princeton, NJ: Princeton University PresS (1949).

(h) Zeisel, H., ". . . And then there were none:" The Diminution of the Federal Jury. 38 *U.Ch. L.Rev.* 710-724 (1971).

(i) Figure 1 (attached)

1. As I understand the issue, it is that the research findings on group decision-making as a function of group size which were adverted to by the U.S. Supreme Court in *Ballew v. Georgia* are thought by some not to apply to military populations. To my knowledge, none of the studies that have been conducted on the question have employed military populations. I think, however, that in the absence of such direct studies, the most defensible conclusion is that the same principles would apply to military as to civilian decision-makers. In the paragraph below I present the general rationale and evidence that lead me to believe this. Let me apologize in advance for any misstatements I might make regarding particulars of procedures in military courts, with which I am unfamiliar. My expertise goes only to the effects of size on group behavior.

a. In the 1940's and 50's a substantial portion of social psychological research on small group behavior was done in, by and for the military. Summaries of much of this work may be found in Hare (1976), McGrath and Altman (1966), and the famous series by Stouffer at al. (1949) on *The American Soldier*. Virtually all of the social psychological phenomena observed among military same principles of attitude change, group influence, and decision-making were found to hold. In particular, it has been repeatedly found, contrary to popular belief, that the composition of a group (that is, the age, education, and other demographic characteristics of group members) bear little or, usually, no relation to the performance of the group's task (i.e., McGrath and Altman, 1966, p. 106-107; Havron et al., 1952; Saks, 1976; Saks and Hastie, 1978). (What can make a difference are specific technical skills required by the task; in the jury situation this is rarely a problem).

b. Most of the variables of interest to the Court in *Ballew* are especially unlikely to behave differently with the use of different populations. Some are strictly statistical phenomena, where it matters not whether the group mem-

bers are military, civilian, or even whether they are people. That is, the ability of groups of varying sizes to provide cross-sectional representation of the community from which they are drawn depends only upon the distribution of objects (people, marbles, cars, anything) in the population and the size of the sample. Similarly, one of the major virtues of a group over individuals is its ability to bring together diverse intellectual and experimental resources. That ability grows with the group's size (although with each additional member each incremental improvement is less than the one that preceded it). Further, there is no obvious reason to think that if larger groups lend themselves to greater resistance of group members to conformity pressures by the majority or promote group deliberation, the population from which the group is drawn will alter these general phenomena (see Zeisel, 1971; Saks, 1977).

c. To say simply that one population is different from another and therefore the findings from one do not generalize to the other is a misleading oversimplification. If a functional relationship is found among population A between size and, say rate of conviction, even a finding that population B convicts at a different rate than population A does not negate the functional relationship. Only an "interaction" of particular sorts could do that. This is illustrated in Figure 1a, where the two different populations show a difference in conviction rates, but their pattern of response to jury size changes is the same. The suggestion that the findings from one population do not apply to another really implies the relationships shown in Figure 1b and 1c. Here, the relation between size and convictions found in population A either does not hold for population B or is reversed. Without evidence, we cannot be certain, but that such a "statistical interaction" obtains in the switch from civilian to military populations seems highly unlikely.

d. In trying to think of some differences that my exist among military populations that could produce such differences, two possibilities occur to me. One is the hierarchical relationship that exists among military personnel. The second is the existence of a likelihood of future interaction among "jury" members. It may be, for example, that due to the influence of higher ranking members, other members of the decision-making body play no independent role, and in essence rubber stamp the preference of the highest authority. I have no way of knowing if this is the case, but it would make the size of the body far less important. This difference is not one of demographics of the military population, but the social structure within which they operate. The suggestion in this paragraph is highly speculative. The point of making it is chiefly to indicate that those who think the difference in populations makes a difference ought to specify just what they believe to be the critical element(s), and offer evidence that takes us beyond speculation.

2. In summary, while I am aware of no direct tests of the question at hand that have been conducted on military populations, it is highly unlikely that that would be a difference that makes any difference. The steps of inference in reaching this conclusion are small ones. In other areas of research, only negligible or no differences have been found between civilian and military populations. There is no apparent reason why the same should not be true in regard to the variable of group size. Moreover, some of the phenomena adverted to in *Ballew* are statistical and have nothing to do with the social characteristics of the population from which a jury is drawn.

Sincerely yours,

/s/ MICHAEL J. SAKS

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Supreme Court, U.S.
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No. 85-175

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT R. GARWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law when, under the courts-martial system created by Congress pursuant to Article I, Section 8 of the Constitution, he was convicted upon the concurrence of at least two-thirds of a five-member court-martial.

2. Whether the military judge properly declined to recuse himself after making public comments about the trial where the court-martial members had no knowledge of the comments, the comments reflected neither bias nor prejudice against petitioner, and the comments did not otherwise prejudice petitioner's right to a fair trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-175

ROBERT R. GARWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Military Appeals (Pet. App. 1a-14a) is reported at 20 M.J. 148. The opinion of the United States Navy-Marine Corps Court of Military Review (Pet. App. 15a-39a) is reported at 16 M.J. 863.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on June 3, 1985. The petition for a writ of certiorari was filed on July 31, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. I) 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, was convicted by a general court-martial convened by the Commanding General, Marine Corps Base, Camp Lejeune,

North Carolina, of communicating with the enemy and assaulting an American prisoner of war, in violation of Articles 104 and 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 904 and 928. The court-martial members sentenced petitioner to be dishonorably discharged from the naval service, to forfeit all pay and allowances, and to be reduced to private, pay grade E-1. The convening authority reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. 860, and approved the findings and sentence. The United States Navy-Marine Corps Court of Military Review, upon mandatory review pursuant to Article 66(b), UCMJ, 10 U.S.C. 866(b), affirmed the findings and sentence (Pet. App. 15a-39a). The United States Court of Military Appeals granted discretionary review, pursuant to Article 67(b)(3), UCMJ, 10 U.S.C. 867(b)(3), to consider two claims of error raised by petitioner.[1] That court also affirmed (Pet. App. 1a-14a).

1. The charges arose from petitioner's activities with the enemy between 1967 and 1969 after his unexplained disappearance from his Marine unit in the Republic of South Vietnam. During these two years, petitioner lived with the enemy, eating and sleeping outside the fenced compound where the enemy confined American prisoners of war. He

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[1]The two issues that the Court of Military Appeals agreed to review were (Pet. App. 2a (capitalization omitted)):

> [1.] Whether the military judge erred in refusing to recuse himself and in refusing to declare a mistrial as a result of judicial misconduct.
>
> [2.] Whether the prosecution of PFC Garwood, in violation of governmental policy not to prosecute prisoners of war who had violated the UCMJ, constituted selective prosecution, and therefore denied PFC Garwood due process of law and the equal protection of the laws, guaranteed by the Fifth Amendment to the United States Constitution

In this Court, petitioner does not raise any question concerning the second issue.

wore an enemy uniform and carried an enemy weapon and ammunition. Petitioner served as a guard over American prisoners of war, interrogated them, and required them to bow to him as a sign of respect. On one occasion, petitioner assaulted an American prisoner of war. In 1973, when the majority of American prisoners of war were repatriated, petitioner did not return. In 1979, following petitioner's encounter with a representative of the United Nations in North Vietnam, petitioner finally returned to United States military control. Pet. App. 2a, 16a, 18a-20a.

2. Pursuant to Article 25(d)(2), UCMJ, 10 U.S.C. 825(d)(2), the convening authority detailed ten officers who in his opinion were best qualified by reason of their age, education, training, experience, length of service, and judicial temperament to serve as members of petitioner's court-martial. Petitioner did not invoke his right under Article 25(c), UCMJ, 10 U.S.C. (& Supp. II) 825(c), to request the detail of enlisted members for his court-martial.

Petitioner filed a preliminary motion in which he requested a trial before a panel of 12 members and requested that the panel be instructed to render a unanimous verdict (Tr. 525-528). Both of these motions were denied. Thereafter, the panel of ten officers was subjected to extensive voir dire, as a result of which the court-martial was reduced to six members (Tr. 1157-1524). Later, following additional voir dire of three members, the military judge granted petitioner's challenge of one more member for cause, and thus the court-martial that tried petitioner ultimately consisted of five officers (Tr. 1594-1601).[2] At no time following his preliminary motion did petitioner renew his request for a larger panel, nor did he ever again request a unanimous verdict instruction.

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[2]Article 16(1)(A) of the UCMJ, 10 U.S.C. 816(1)(A), provides that a general court-martial shall consist of a minimum of five members.

At the conclusion of the trial, the five members, by secret written ballot, with at least two-thirds of the members concurring in each finding, found petitioner guilty on both charges. The sentence imposed by the members was determined in the same manner.[3]

On appeal, the United States Navy-Marine Corps Court of Military Review rejected without discussion petitioner's argument that his conviction by the concurrence of at least two-thirds of a five-member court martial had denied him a fair and impartial jury in violation of his Fifth and Sixth Amendment rights. The United States Court of Military Appeals, while granting review on two other issues, declined to grant discretionary review on this issue (see note 1, *supra*).

3. This was a highly publicized case. Sensitive to both the media demands for information and the potential impact of publicity on petitioner's right to a fair trial, the military judge issued a written judicial order on the first day of trial prohibiting out-of-court statements by all persons involved in the trial (Pet. App. 22a-23a). However, the military judge "strongly believe[d] in the public's right * * * to be informed" as to matters of public interest, court cases, and how public officials conduct business (Tr. 3827). In keeping with this view, the military judge, during the period December 1980 through February 1981, engaged in

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[3]Article 51(a) of the UCMJ, 10 U.S.C. 851(a), requires that voting by members be by secret written ballot. Article 52(a)(2) of the UCMJ, 10 U.S.C. 852(a)(2), requires that a finding of guilty be by the concurrence of two-thirds of the members present at the time the vote is taken. (Even when more than the required two-thirds of the members vote to convict, that fact is not announced.) Article 52(b)(3) of the UCMJ, 10 U.S.C. 852(b)(3), likewise requires that a sentence that does not include death, life imprisonment, or confinement for more than ten years be determined by the concurrence of at least two-thirds of the members present at the time the vote is taken.

a number of interviews with local and national media representatives to explain military law and his court rulings (Tr. 2880, 3828). The military judge made his remarks during interviews outside the courtroom and during appearances on a CBS evening television news program and ABC's "Nightline" program (Pet. App. 23a-24a).

The majority of the military judge's comments concerned the length and schedule of hearings, the military judge's rulings on trial matters that were already in the public record, and explanations of military justice procedures that had already been discussed in open court (Tr. 2880). However, the United States Navy-Marine Corps Court of Military Review stated (Pet. App. 24a) that some of the trial judge's remarks

> involved the expression of his opinion regarding tactical decisions by the [petitioner's] defense team; the relevancy of certain defense discovery items; comments, delivered to the media, which could be interpreted as disparaging the testimony of one of the [petitioner's] psychiatrists; and opinions expressing the view that [petitioner] should take the stand and testify regarding the charges.

The military judge specifically contested the accuracy of the media reports of his remarks (Tr. 2861-2866).

After the military judge's initial public remarks, petitioner's civilian counsel moved for dismissal of the charges or, alternatively, for recusal of the military judge (Pet. App. 24a). Alleging a lack of impartiality on the part of the military judge, petitioner relied on the pertinent military standard for testing the suitability of a judge to preside. See *Manual for Courts-Martial, United States—1969* ¶ 62f (rev. ed.), reprinted at Pet. App. 5a-6a.

In response to petitioner's motion, the members were subjected to extensive voir dire. That process revealed that the members had no conscious knowledge of the military

judge's out-of-court comments. As the United States Navy-Marine Corps Court of Military Review stated (Pet. App. 27a):

> [W]e find, after examining the extensive *voir dire* of the court members; their candid responses regarding attempts by press representatives to interview them; their rebuffs of such attempts; their adamant statements denying both any knowledge or contact with press, radio, or television reports of the case throughout their period of appointment to the court and their denial of any individual, social, or other contact or discussions regarding the case, no indication of prejudicial impact on the members of the court.

Having failed to establish any actual prejudice, petitioner sought to present evidence on the psychological concept of "subliminal perception" to establish that the military judge's comments could have affected the members unconsciously. The military judge refused to consider the proffered evidence, and he denied the motion to dismiss the charges and declined to recuse himself. Pet. App. 8a, 24a, 27a.

Later in the trial, following closing arguments on findings, petitioner's counsel again challenged the trial judge for cause and moved for a mistrial alleging bias against petitioner and judicial misconduct. After additional voir dire by counsel and the military judge revealed that the members still had no knowledge of the military judge's remarks, the military judge denied the defense challenge and motion for a mistrial. The trial resumed and was carried through to conclusion. Pet. App. 24a.

ARGUMENT

The importance of this prosecution lies in its reaffirmation of a principle that has immeasurable impact on military discipline: An American serviceman is always accountable for his actions, even as a prisoner of war. However, this case

does not raise any important issues of law. The issues petitioner presents for review are common and familiar to the military justice system. Moreover, this Court recently denied a petition for a writ of certiorari that raised a virtually identical challenge to the size and unanimity requirements of the courts-martial system. See *Hutchinson* v. *United States*, cert. denied, No. 84-254 (Nov. 5, 1984). Accordingly, further review is not warranted.

1. a. Relying on *Ballew* v. *Georgia*, 435 U.S. 223 (1978) (opinion of Blackmun, J.) (holding that five-person juries in nonpetty criminal cases violate the Sixth Amendment as made applicable to the states by the Fourteenth Amendment), and *Burch* v. *Louisiana*, 441 U.S. 130 (1979) (holding that nonunanimous verdicts by six-person juries in nonpetty criminal cases violate the Sixth and Fourteenth Amendments), petitioner contends that his conviction by a possibly non-unanimous five-member court-martial must be set aside. Petitioner's attack on the size and unanimity requirements established by Congress for courts-martial should be rejected.[4]

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[4]It bears noting that, throughout these proceedings, petitioner has failed to present any consistent theory in support of his attack on the size of the court-martial and the absence of a requirement for a unanimous verdict. At trial, petitioner argued that the reliability of the truth-finding process is adversely affected by anything less than a unanimous decision of 12 people. But petitioner did not ask for a minimum of at least six jurors, nor did he request that the five members actually empanelled reach a unanimous verdict. It is especially significant that petitioner did not seek an increase in the size of the panel following the grant of his final challenge for cause, which was the event that led to his trial by a five-member court.

In his assignment of errors to the United States Navy-Marine Corps Court of Military Review, petitioner abandoned the position that 12 members are constitutionally required (a concession necessarily required by *Williams* v. *Florida*, 399 U.S. 78 (1970)), but he did not state what size panel should be required. The Court of Military Review rejected petitioner's abstract and amorphous argument without discussion. Similarly, the United States Court of Military Appeals refused even to consider the issue. See note 1, *supra*.

Under the guise of a Fifth Amendment due process claim, petitioner seeks to impose on the courts-martial system requirements this Court has found inherent in the Sixth Amendment's guarantee of a trial by jury. But petitioner concedes (Pet. 10 n.18), as he must, that he has no Sixth Amendment right to a jury trial. This Court has held in an unbroken line of cases stretching back to *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), that the jury trial guarantee of the Sixth Amendment is not available to the military accused.[5] In *Milligan*, the Court held that armed forces personnel, expressly exempted from the Fifth Amendment right of indictment, are also exempted, by necessary implication, from the Sixth Amendment right to trial by jury. 71 U.S. (4 Wall.) at 123. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court noted that neither the Sixth Amendment nor Article III, Section 2 of the Constitution requires trial by jury in the armed forces. The Court concluded that neither provision was intended to enlarge the right to trial by jury as it existed at the time of enactment of the Constitution and the Bill of Rights. Rather, the Framers intended (317 U.S. at 39 (emphasis added)):

> to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but *not* to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

The legislative history available to interpret the jury trial guarantee admits of only one construction: it was never

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[5] *O'Callahan* v. *Parker*, 395 U.S. 258 (1969); *Reid* v. *Covert*, 354 U.S. 1 (1957); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Ex parte Quirin*, 317 U.S. 1, 8 (1942); *Kahn* v. *Anderson*, 255 U.S. 1 (1921).

intended to apply to the military.[6] The military courts have relied on this construction and have repeatedly rejected the precise contention raised by petitioner here.[7]

b. Petitioner's argument fares no better when viewed as a Fifth Amendment due process claim. Neither *Burch* nor *Ballew* dealt with Congress's power to create rules for courts-martial pursuant to Article I, Section 8 of the Constitution, a power that is *independent* of Article III, Section 2, and the Fifth and Sixth Amendments.[8] Moreover, neither case dealt with the fundamental matter of the separate nature of military society.

This Court has long recognized the special deference due to judgments made by Congress in the exercise of its power to "make Rules for the Government and Regulation of the land and naval Forces" (U.S. Const. Art. I, § 8, Cl. 14). As the Court stated in *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (footnote omitted):

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[6]See generally Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1972); see also Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

[7]*United States* v. *Rojas*, No. 81-2109 (N.-M.C.C.M.R. Aug. 23, 1984); *United States* v. *Seivers*, 9 M.J. 612 (A.C.M.R.), pet. granted on other grounds, 9 M.J. 253 (C.M.A.), aff'd, 9 M.J. 397 (C.M.A. 1980); *United States* v. *Yoakum*, 8 M.J. 763 (A.C.M.R.), pet. granted on other grounds, 9 M.J. 137 (C.M.A.), aff'd, 9 M.J. 417 (C.M.A. 1980); *United States* v. *Guilford*, 8 M.J. 598 (A.C.M.R. 1979), pet. denied, 8 M.J. 242 (C.M.A. 1980); *United States* v. *Montgomery*, 5 M.J. 832 (A.C.M.R. 1978), pet. denied, 6 M.J. 89 (C.M.A. 1978). The Court of Military Appeals has ruled contrary to petitioner's argument on similar issues. See *United States* v. *Morphis*, 7 C.M.A. 748, 23 C.M.R. 212 (1957); *United States* v. *Walker*, 7 C.M.A. 669, 23 C.M.R. 133 (1957).

[8]*Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 246 (1960); *id.* at 272-273 (opinion of Whittaker, J.); *Reid* v. *Covert*, 354 U.S. 1, 19-39 (1957) (plurality opinion); *id.* at 42 (Frankfurter, J., concurring); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65 (1857).

> [T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers especially entrusted that task to Congress.[9]

Especially heightened deference is due Congress's judgments in this area when the practices at issue date back to the earliest days of our Nation. From the adoption of the American Articles of War of 1776 until the enactment of the Uniform Code of Military Justice in 1950, conviction required only the concurrence of a simple majority of a court-martial panel. Section XIV, Art. 5, American Articles of War of 1776, *reprinted in* 5 Journals of the Continental Congress 801 (Ford ed. 1906) [hereinafter cited as *Journals*]. Since the adoption of the UCMJ, conviction has required the concurrence of two-thirds of the panel. Art. 52(a)(2), UCMJ, 10 U.S.C. 852(a)(2). Unanimity has never been required, except in those cases in which death is the mandatory sentence. Art. 52(a)(1), UCMJ, 10 U.S.C. 852(a)(1). It is also worth noting that, in the naval service, the practice of detailing five members to a court-martial in a capital case, and three in a noncapital case, is of very long standing. In 1782, Congress substantially adopted the then-current British practice of naval courts-martial. Congress provided for the structure of the court-martial panel itself, stating (7 *Journals* 325):

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[9]Accord *Chappell* v. *Wallace*, 462 U.S. 296, 300-304 (1983); *Middendorf* v. *Henry*, 425 U.S. 25, 43-48 (1976); *Parker* v. *Levy*, 417 U.S. 733 (1974); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955); *Reaves* v. *Ainsworth*, 219 U.S. 296 (1911); *In re Vidal*, 179 U.S. 126 (1900); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65 (1857).

> [A] marine court of enquiry or court-martial for enquiring into or trying of all capital cases, shall consist of at least five commissioned navy and marine officers, two of whom shall be captains, and in all cases not capital it shall consist of three such officers, one of which shall be a captain in the navy of the United States.

History demonstrates that these provisions are no accident but instead represent Congress's considered judgment on the balance to be struck between the rights of the individual and the special requirements of the armed forces. For example, Section XIV, Article 1 of the American Articles of War of 1776 provided that at least 13 officers were required for all general courts-martial. 5 *Journals* 800. After the cessation of hostilities with Britain, the Army was faced with large numbers of desertions and an understaffing of officers. The problem became particularly acute at frontier outposts. In 1786, the commander of one of these small outposts convened a court-martial composed of only five officers to consider charges of desertion placed against two soldiers. Both men were convicted, and both were sentenced to death. The court-martial as constituted was illegal, but Congress was sympathetic with the commander's plight. In 1786, the Articles were changed to permit a quorum of five officers at a general court-martial and three officers at a regimental court-martial. 30 *Journals* 145; see Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363, 384-385 n.118 (1972).

It was thus Congress's experience with military exigencies and the necessity for maintaining small, remote units, conditions that exist even today, that heavily influenced the structure of the court-martial panel. In enacting the UCMJ, Congress had a rational basis, rooted in two centuries of

precedent and experience, for rejecting the size and unanimity requirements demanded by petitioner.[10] The essential business of the military is, after all, "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). Courts-martial, while of critical mportance to the maintenance of discipline, are a decidedly secondary function. *Ibid.* "To the extent that those responsible for performance of this primary [fighting] function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Ibid.* In these circumstances, Congress could rationally conclude that diversion of the additional resources necessary to conduct any retrials that might be occasioned by a unanimous verdict requirement is too high a price

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[10] Congress considered testimony in favor of a unanimous verdict requirement before the UCMJ was enacted. *Uniform Code of Military Justice (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 757 (1949) (testimony of Col. Oliver). Articles 16 and 52 were nevertheless adopted in substantially their present form. Moreover, since the UCMJ was enacted, Congress has considered but not enacted at least three bills that would have specifically required unanimous verdicts. H.R. 7263, H.R. 7292, H.R. 7467, 92d Cong., 1st Sess. (1971).

In the 22 instances since 1950 when bills have been enacted by Congress changing various sections of the UCMJ, Congress has never seen fit to change the provisions at issue in this case. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 *et seq.*; Act of Oct. 12, 1982, Pub. L. No. 97-295, § 1(12) and (13), 96 Stat. 1289; Military Justice Amendments of 1981, Pub. L. No. 97-81, §§ 1-6, 95 Stat. 1085-1089; Military Pay and Allowances Benefits Act of 1980, Pub. L. No. 96-579, § 12(a), 94 Stat. 3369; Defense Officer Personnel Management Act, Pub. L. No. 96-513, § 511(24) and (25), 94 Stat. 2922; Department of Defense Authorization Act, 1980, Pub. L. 96-107, § 801(a) and (b), 93 Stat. 810 and 811; Act of Oct, 18, 1976, Pub. L. No. 94-550, § 3, 90 Stat. 2535; Military Justice Act of 1968, Pub. L. No. 90-632, § 2, 82 Stat. 1335; Act of June 15, 1968, Pub. L. No. 90-340, 82 Stat. 178 *et seq.*; Act of Dec. 8, 1967, Pub. L. No. 90-179, § 1, 81 Stat. 545; Act of Nov. 2, 1966, Pub. L. No. 89-718, § 8(a), 80 Stat. 1117; Department of Transportation Act, Pub. L. No. 89-670, § 10(g), 80 Stat. 948; Government Employees Salary Reform Act of 1964, Pub. L. No. 88-426, § 403(j), 78 Stat. 434; Act of Sept. 7, 1962, Pub. L. No. 87-651, § 104, 76 Stat. 508;

to pay in terms of lost military preparedness.[11] Petitioner has not demonstrated the "extraordinarily weighty" considerations necessary to overcome this long-standing congressional judgment. *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976).[12]

Act of Sept. 7, 1962, Pub. L. No. 87-648, 76 Stat. 447 *et seq.*; Act of Oct. 4, 1961, Pub. L. No. 87-385, 75 Stat. 814 *et seq.*; Act of July 12, 1960, Pub. L. No. 86-633, 74 Stat. 468 *et seq.*; Hawaii Omnibus Act, Pub. L. No. 86-624, § 4(b), 74 Stat. 411; Act of July 5, 1960, Pub. L. No. 86-589, 74 Stat. 329 *et seq.*; Alaska Omnibus Act, Pub. L. No. 86-70, § 6(b), 73 Stat. 142; Act of Sept. 2, 1958, Pub. L. No. 85-861, § 33(a) and (b), 72 Stat. 1564 and 1566; Act of Aug. 10, 1956, ch. 1041, 70A Stat. 1 *et seq.*

[11]The importance to the military justice system of avoiding retrials is highlighted by the fact that the system does not provide for "hung juries." See Rule 921(c)(3), *Manual for Courts-Martial, United States—1984*. If there are not the necessary votes for conviction, the accused is acquitted, even though half or more of the members of the court-martial may be persuaded beyond a reasonable doubt of his guilt. If Congress were compelled to require unanimous verdicts for conviction, it might find itself forced as well to import the civilian concept of retrials after hung juries, to the potential detriment of military efficiency.

[12]As this Court has consistently noted, many of the substantial constitutional rights enjoyed in the civilian community do not exist in our system of military justice absent congressional direction to that end. See *Middendorf* v. *Henry*, 425 U.S. at 33-34, 42-43, 46-48; *Schlesinger* v. *Councilman*, 420 U.S. 738, 746, 757-760 (1975); *Parker* v. *Levy*, 417 U.S. 733, 743-752 (1974); *Gosa* v. *Mayden*, 413 U.S. 665, 672-678 (1973); *Relford* v. *Commandant*, 401 U.S. 355, 362-363, 367-369 (1971); *O'Callahan* v. *Parker*, 395 U.S. 258, 261-264 (1969). At the same time, however, it is important to note that while Congress has not chosen to grant the military accused the right to trial by jury, it has established independent safeguards against unjustified convictions. No charge may be referred to a general court-martial for trial without an impartial investigation into the evidence supporting the charge. Art. 32, UCMJ, 10 U.S.C. 832. This procedure includes the right of the accused to be represented by counsel. A convening authority may not refer a charge to a general court-martial for trial without independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. (Supp. II) 834(a). The Court of Military Review may not affirm findings of

c. The Court based its decision in *Ballew* on empirical studies of the group dynamics of civilian juries (435 U.S. at 231-243 (opinion of Blackmun, J.)), and much the same reasoning formed the basis for the decision in *Burch* (441 U.S. at 138). No comparable studies exist for court-martial panels. Nevertheless, it seems quite likely that the make-up of a court-martial is sufficiently different from that of a civilian jury that the available studies cannot form the basis for any reliable conclusions about the deliberative processes of courts-martial.[13] For example, unlike civilian juries selected at random to represent a cross-section of the community, court martial members are deliberately chosen on the basis of who is best qualified to sit as a member. Art. 25, UCMJ, 10 U.S.C. (& Supp. II) 825.[14] The result is a body far more homogenous than the typical civilian jury and hence one that is likely to be influenced by quite different factors from those found significant in the studies of civilian juries.

The important question, however, is not whether the studies relied upon in *Ballew* shed light on the issue presented by petitioner, but whether this Court should take on

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guilt unless it is independently convinced of the accused's guilt beyond a reasonable doubt, Art. 66(c), UCMJ, 10 U.S.C. 866(c), and the accused may seek review of that decision by the Court of Military Appeals, a panel of three civilian judges. Art. 67, UCMJ, 10 U.S.C. (& Supp. II) 867. See generally *United States* v. *Boland*, 1 M.J. 241 (C.M.A. 1975); Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 Me. L. Rev. 105 (1970).

[13]Petitioner relies (Pet. 11 n.19) on the opinion of Professor Saks (Pet. App. 40a-43a) to the effect that conclusions drawn from studies of civilian juries should be transferable to courts-martial panels. But Professor Saks admits (*id.* at 41a, 43a) that he knows of no comparable studies involving military populations, and he further acknowledges (*id.* at 43a) that military populations could produce different results.

[14]At trial, petitioner's counsel acknowledged that the requirements applicable to the selection of court-martial members may result in "more of a blue-ribbon jury than you get in a civilian population" (Tr. 525).

the task of considering the dynamics of group decisionmaking by courts-martial. More than sociology is involved here; the asserted rights of the military accused must be balanced against the special and unique institutional needs of the armed forces. In light of the special deference due to Congress's judgments in this area, as well as Congress's generally superior fact-finding capabilities, we submit that that body, rather than civilian courts, should have the responsibility to consider the question whether studies of the type relied upon in *Ballew* ought to form the basis for any change in the UCMJ.[15] As we have noted (see note 10, *supra*), Congress has considered but not enacted bills calling for unanimous guilty verdicts by courts-martial. The appropriate forum for resolution of petitioner's sociological arguments is therefore the Legislative Branch.

2. a. For the first time in this case, petitioner asserts (Pet. 14) that "the military judge's misconduct reasonably raised such serious questions about the fairness and integrity of the trial proceedings that petitioner's right to due process was violated."[16] Because petitioner did not make this constitutional argumen below, neither the rulings of

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[15]An excellent analysis of the separate nature of military society, past and present, and the reasons why Congress is the branch of government most adept at dealing with military justice, is contained in Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. Rev. 177 (1984).

[16]At trial, petitioner requested that the military judge recuse himself and challenged the military judge for cause (Tr. 2845). The "focus of this challenge" was an alleged lack of impartiality on the part of the military judge (Tr. 2884). Petitioner's legal authority for this allegation was the *Manual for Courts-Martial, United States—1969* ¶ 62f (rev. ed.). This was the pertinent military standard at the time of petitioner's trial for testing the suitability of a judge to sit on a particular case (Tr. 2881).

On appeal, petitioner relied on this same legal authority to challenge the propriety of the military judge's decision not to recuse himself. In neither military appellate court did petitioner allege a violation of due process.

the military judge nor the opinions of the military appellate courts address the constitutional issue. In these circumstances, review by this Court would be inappropriate. See, *e.g.*, *County of Oneida* v. *Oneida Indian Nation*, No. 83-1065 (Mar. 4, 1985), slip op. 16-17.

b. In any event, petitioner's challenge to the actions of the military judge does not raise any substantial constitutional question. At trial and on appeal, petitioner challenged the suitability of the military judge to preside based on well-recognized principles of military and civilian jurisprudence. Petitioner had the burden to establish that the military judge abused his discretion in denying petitioner's challenges to the judge's impartiality and in refusing to grant a mistrial. *United Stated* v. *Rosser*, 6 M.J. 267 (C.M.A. 1979); *United States* v. *Thompson*, 5 M.J. 28 (C.M.A. 1978); *United States* v. *Talbott*, 12 C.M.A. 446, 31 C.M.R. 32 (1961); *Manual for Courts-Martial, United States—1969* ¶ 62h (rev. ed.). Both military appellate courts rejected petitioner's fact-bound contention and concluded that the military judge appropriately denied petitioner's challenge for cause and motion for a mistrial. The lower courts' resolution of this question is not of sufficient general importance to warrant this Court's review.

The United States Court of Military Appeals correctly concluded that petitioner received a fair trial notwithstanding the military judge's public comments, for the record establishes that the members were unaware of the comments. In evaluating the degree and type of prejudicial publicity that is necessary in order to find a constitutionally unfair trial, this Court has stated that it will entertain a presumption of prejudice due to trial or pretrial publicity only in cases in which "the influence of the news media, either in the community at large or in the courtroom itself, [so] pervade[s] the proceedings" that the trial itself becomes " 'but a hollow formality.' " *Murphy* v. *Florida*, 421 U.S. 794, 799 (1975) (citation omitted).

In the instant case, there was no prejudice to petitioner from the military judge's remarks. Petitioner has been unable to establish either at trial or on appeal that the military judge's remarks had any effect on the members. Indeed, petitioner's counsel conceded on appeal that "there is no evidence that any of the court members ever *consciously* heard or read any description or accounts of the military judge's off-the-record remarks" (Pet. App. 8a). Throughout the trial and appellate proceedings, petitioner argued instead that subconscious or "subliminal perceptions"—information received without the recipient's knowledge—would tend to have a substantial impact on the opinion and judgment of the court members. The trial judge and both appellate courts correctly rejected this speculative argument in favor of the "forthright assertions of the court members that they scrupulously observed the judge's standing order to avoid all discussion, contact with, or proximity to news reports, conversations, or press notices regarding the case" (*id.* at 27a; see also *id.* at 7a-8a).

These conclusions were based on detailed individual voir dire of all members. When the voir dire established that the members had no knowledge of any public comments about the trial, petitioner did not challenge any of the members. Furthermore, the military judge then individually instructed each member to guard against publicity. Moreover, the military judge repeatedly asked the members during the course of trial whether they had any knowledge of publicity in this case and repeatedly offered the defense an opportunity to voir dire the members. Tr. 2851-2857, 3477-3478, 3663-3667, 3761-3762. These actions by the military judge ensured that the members did not at any time learn of the public discussion of the case. Petitioner's counsel even stated "we've got a fair jury chosen" and "[w]e do not want to start over under any circumstances" (Tr. 2849). This concession at trial militates against petitioner's belated

challenge to the fairness of his trial. Petitioner asks this Court to make a third review of the lengthy record of trial to see if it can find what two other appellate courts have been unable to find—proof of any prejudice to his case by the military judge's out-of-court comments. His invitation should be declined.

c. We note also that the military judge's public statements and his statements at trial demonstrate that he had no bias against petitioner and that his comments did not create a perception of unfairness. The majority of his public comments were permissible and concerned the length and schedule of hearings, his rulings on trial matters that were already in the public record, and explanations of military justice procedures. Even the judge's improper remarks (see Pet. App. 24a) about defense trial tactics did not reveal any unfairness or bias.[17] Indeed, the military judge's expression of sympathy for petitioner at trial demonstrates his fairness and impartiality in this proceeding.[18]

d. Finally, the standards for a military judge's relationship with the press are unequivocally clear, and there is no need for this Court to clarify those standards. Canon 3(A)(6) of the ABA's Code of Judicial Conduct (1972) and Standard 8-2.1 of the ABA's Standards on Fair Trial and

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[17]How remarks of this nature, even if improper, could achieve significant "subliminal" effect on the members of the court-martial even if they penetrated their subconscious is baffling.

[18]At the conclusion of trial, the military judge made a poignant comment about his personal feelings toward the accused (Tr. 3826):

> Now, in all honesty, I would have to say that while I had no personal opinion as to the guilt or innocence of the accused, I cannot deny that I had a great deal of sympathy for the accused, and I think I have expressed that on any number of occasions, both in court and out of court. But I tried not to allow that personal sympathy and empathy to interfere with any rulings or determinations that I made in the case * * *.

Free Press (1980) define the permissible scope of public discussion of an ongoing trial by a sitting judge. Equally important, both military appellate courts in this case concluded that the military judge's public comments were improper. The Court of Military Review found that the military judge's conduct was "inexcusable" and expressed its "upmost [*sic*] disapproval" of the military judge's violation of judicial standards (Pet. App. 25a, 26a). Similarly, the Court of Military Appeals stated (*id.* at 6a) that the military judge's "comments exceeded the permissible scope of public discussion of an on-going trial by a sitting judge; and quite properly, the Court of Military Review * * * has chastised him." This explicit criticism of the military judge's mistake in these two opinions reinforces the standards for judicial conduct. No action by this Court is necessary to reaffirm the obvious.

The military judge's mistake in this case was an isolated incident, in no way indicative of a systemic problem in either the military or civilian justice system. There are no other reported military cases involving improper public comments about a case, and only a few reported federal decisions involve this issue. See, *e.g.*, *United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977).

In summary, although the public comments by the military judge were injudicious, these comments did not so pervade the trial that it became a "hollow formality." The statements themselves did not reveal any personal bias or prejudice on the part of the military judge, and the members had no knowledge of the remarks. Therefore, the military judge properly denied the challenge for cause and the motion for mistrial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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